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No.

In the Supreme Court of the United States

October Term, 1984

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners

vs.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR

and

UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAY C. WALDMAN
General Counsel
Office of General Counsel
SPENCER A. MANTHORPE
Chief Counsel
Department of Transportation
JOHN W. CARROLL
Acting Chief Counsel
Department of Environmental Resources
JOHN M. HRUBOVCAK
Assistant Counsel
Department of Transportation
By: JOHN P. KRILL
Deputy General Counsel
Office of General Counsel
Attorneys for Petitioners

Office of General Counsel
Commonwealth of Pennsylvania
Post Office Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

STATEMENT OF THE QUESTION PRESENTED

1. Whether a federal court consent decree can provide a state's Executive Branch with the authority to implement a program involving the state's police powers and can supplant the state's Legislative Branch, in contravention of the state's Constitution, when the consent decree is founded upon a state law that the state's Supreme Court subsequently finds did not grant the Executive Branch any authority either to implement the program or to execute the consent decree and whether such a consent decree must be vacated.

TABLE OF PARTIES

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR; AMERICAN LUNG ASSOCIATION FOR PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; KEVIN QUINN, KAYSI FARRELL, RUTH G. WEISS; JOHN KLINKNER, ELIZABETH S. BIEZ; MONA SHULMAN,

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA; WILLIAM T. SHERLOCK, Individually and as Secretary of the Pennsylvania Department of Transportation; MAURICE K. GODDARD, Individually and as Secretary of the Pennsylvania Department of Environmental Resources,

Defendants

(D.C. Civil No. 76-2068)

Table of Parties

UNITED STATES OF AMERICA,

Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA, the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources,

Defendants

(D.C. Civil No. 77-0619)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, the Commonwealth of Pennsylvania, Thomas D. Larson, the Pennsylvania Secretary of Transportation, and Nicholas DeBenedictis, the Pennsylvania Secretary of Environmental Resources, hereby respectfully petition this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on February 11, 1985.

I. OPINIONS OF THE COURTS BELOW

The opinion of the District Court dated April 13, 1984, denying the motion to vacate the consent decree, and the opinion of the District Court dated April 26, 1984, appointing a master, are not reported. These two opinions are reproduced in the Appendix at 1a to 2a and at 3a to 6a, respectively.

On February 11, 1985, the Court of Appeals affirmed the opinion of the District Court. This opinion is reported at 755 F.2d 38 (3d Cir. 1985) and is printed in the Appendix at 7a to 25a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article IV, §4:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

2. United States Constitution, Article IV, §1 (full faith and credit clause):

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

3. Pennsylvania Constitution, Article II, §1:

> *"Legislative Power*
>
> The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

4. Pennsylvania Constitution, Article III, §1:

"Passage of Bills

No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose."

5. Pennsylvania Constitution, Article IV, §1:

"Executive Department

The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction and such other officers as the General Assembly may from time to time prescribe."

6. Pennsylvania Constitution, Article IV, §2:

"Duties of Governor; Election Procedure; Tie or Contest

The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed. . . ."

7. Pennsylvania Constitution, Article V, §1:

"Unified Judicial System

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system."

8. Pennsylvania Constitution, Amendment XI, §1:

"Proposals of Amendments by the General Assembly and Their Adoption

Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House . . .; and such proposed amendment or amendments shall be submitted to the qualified electors of the State . . .; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution. . . ."

IV. STATEMENT OF THE CASE

This action was commenced in July, 1976 by Delaware Valley Citizens' Council for Clean Air[1] (hereinafter "Delaware Valley") against the Commonwealth of Pennsylvania and certain of its Executive Branch officials[2] (hereinafter "state officials").[3] Delaware Valley sought to compel the state officials to implement a motor vehicle emission inspection and maintenance program (hereinafter "I/M program") in fourteen of Pennsylvania's 67 counties.[4] Also named as a defendant was an official of the United States Environmental Protection Agency, who was asked by Delaware Valley to compel the state officials to implement an I/M program. Delaware Valley based its complaint on the Clean Air Act, 42 U.S.C. §1857 et seq.

[1] Delaware Valley is a nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania.

[2] The named state officials are William T. Sherlock, Secretary of the Pennsylvania Department of Transportation and Maurice K. Goddard, Secretary of the Pennsylvania Department of Environmental Resources. The present Secretary of the Pennsylvania Department of Transportation is Thomas D. Larson; the present Secretary of the Pennsylvania Department of Environmental Resources is Nicholas DeBenedictis.

[3] The Pennsylvania General Assembly was not named as a party to this action, although certain of its members moved unsuccessfully to intervene as defendants.

[4] An emission inspection and maintenance program consists of checking the tailpipe emissions (hydrocarbon and carbon monoxide) of vehicles by means of an analyzer, and requiring that vehicles which exceed a specified level of emissions have repairs performed to lower their emissions to the specified level.

(1976) (since amended and reclassified at 42 U.S.C. §7401 et seq. (1982)). In February, 1977, the United States commenced a second suit seeking to compel the state officials to implement an I/M program. As a result, Delaware Valley agreed to the dismissal of the Environmental Protection Agency official as a defendant in its action.

On August 29, 1978, the parties entered into a consent decree requiring the state officials to implement the I/M program (60a to 80a). The consent decree was entered into on the premise that state statutes, i.e., 75 Pa. Cons. Stat. Ann. §4701 et seq. (Purdon 1977) (amended, Purdon Supp. 1984-1985), as they existed in 1978, granted express authority to implement an I/M program. The consent decree did not, as it could not, require that the General Assembly of Pennsylvania pass any form of legislation to implement the program. The consent decree provided, inter alia, for implementation of the I/M program in ten counties in metropolitan Philadelphia and Pittsburgh, Pennsylvania by February 1, 1981, later extended to November 1, 1981 by agreement of all parties.[5]

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[5] On April 29, 1981, the state officials filed a motion with the United States District Court to modify the consent decree by postponing the date for implementation of the I/M program to January 1, 1983. Delaware Valley opposed this motion. On May 20, 1981, the District Court denied this motion, and on June 16, 1981, the Court ordered the I/M program to begin by May 1 1982. The Court of Appeals on March 1, 1982, upheld the order of the District Court and on March 26, 1982, denied a petition for rehearing en banc. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 976 (3d Cir. 1982). On October 12, 1982 a Petition for Writ of Certiorari from the order of March 1, 1982 was denied. 459 U.S. 905 (1982).

On October 5, 1981, the Pennsylvania General Assembly enacted H.B. 456, over the veto of Pennsylvania Governor Dick Thornburgh, prohibiting the Pennsylvania Department of Transportation or any other department or agency of the Executive Branch of the Commonwealth from spending any public funds for the I/M program.[6] Pa. Stat. Ann. tit. 71, §523 (Purdon Supp. 1982-1983) (repealed 1983) ("Act No. 1981-99"). Within two weeks of the enactment of Act No. 1981-99 over the Governor's veto, the state officials sought to stay and to modify the 1978 consent decree because the passage of Act No. 1981-99 had deprived them of any legal authority to spend money to carry out the I/M program. Delaware Valley filed a motion to declare the state officials in civil contempt and to impose sanctions.[7]

In 1981, other plaintiffs filed suit in state court raising the question of whether there existed any state authority to implement an I/M program and to enter into the consent decree. On May 10, 1982, the Commonwealth Court of Pennsylvania found that the state statutes existing at the time of the consent decree granted authority to implement an I/M program. *Burd v. Commonwealth*, 66 Pa. Commonwealth Ct. 129, 443 A.2d 1197 (1982). In May,

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[6] Governor Thornburgh on December 28, 1979, successfully vetoed H.B. 739, which sought to delay the I/M program.

[7] On January 22, 1982, the District Court granted the contempt motion and withheld grants for highway projects in ten counties. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869 (E.D. Pa. 1982). On March 19, 1982, the Court of Appeals granted a stay and on May 21, 1982 affirmed the order of the District Court. 678 F.2d 470 (3d Cir. 1982). On November 1, 1982, a Petition for Writ of Certiorari was denied. 459 U.S. 969 (1982).

1983, the General Assembly enacted Act 1983-3, codified at 75 Pa. Cons. Stat. Ann. §4706 (Purdon Supp. 1984-1985), which permitted an I/M program to be operated under certain circumstances. On October 26, 1983, the Pennsylvania Supreme Court, after reviewing all state statutes that could have provided the legislative authority to implement an I/M program, reversed the 1982 Commonwealth Court decision, finding no state authority to implement an I/M program and no state authority to enter into the consent decree. *Scanlon v. Commonwealth,* 502 Pa. 577, 467 A.2d 1108 (1983) (reproduced at 26a to 55a). The Pennsylvania Supreme Court also held, as a matter of constitutional government in Pennsylvania, that Act 1983-3 did not retroactively grant any authority to implement an I/M program or to enter into the consent decree. *Id.* at 590, 467 A.2d at 1114-15 (41a to 42a). A petition for reargument was denied on December 1, 1983 (56a). On January 9, 1984, the Commonwealth Court, pursuant to the order of the Supreme Court, issued an order which declared that the state officials did not have the authority to enter into or to implement the consent decree (57a to 59a).

On March 5, 1984, a motion to vacate the consent decree was filed with the District Court. On April 13, 1984, the District Court issued a one-page opinion refusing to vacate the consent decree (1a to 2a). On April 26, 1984, the District Court issued an order appointing a master and denying additional sanctions requested by Delaware Valley (3a to 6a).

Thereafter, the state officials appealed both orders to the Court of Appeals for the Third Circuit. On February 11, 1985, the Court of Appeals affirmed the District

Court's judgment, maintaining the consent decree and the master, even though it had been held that there was no state authority to implement or to enter into the consent decree. It is this decision which the state officials ask this Court to review.

V. REASONS FOR GRANTING THE WRIT

A. The Circuit Court's Opinion Raises Significant Questions Concerning the Constitutional Government of States

The instant case presents an important issue for review: whether the constitutional framework of government in a state, or even in the federal government, which includes separation and balance of powers, can be altered by the entry of a consent decree in a federal district court.

The government of Pennsylvania, like that of most of the states and of the United States, is founded on a Constitution which provides for three separate and independent branches of government—an Executive Branch (Article IV, §§1-2), a Legislative Branch (Article II, §1), and a Judiciary (Article V, §1). In Pennsylvania, as in all the states, state action must be founded upon authority derived either directly from the state Constitution, or from legislation duly promulgated by the Legislative Branch under that Constitution (Article III, §1).

In Pennsylvania, the General Assembly has the *sole* power under the Pennsylvania Constitution to pass legislation. The Executive Branch may carry out only those programs authorized by legislation. *Shapp v. Sloan*, 480 Pa. 449, 468-69, 391 A.2d 595, 604 (1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979). In addition, the Pennsylvania Constitution, Article III, §24, expressly prohibits state agencies under the Executive Branch from spending for purposes not specifically authorized by legislative appropriation. *Ashbourne*

School v. Commonwealth, 43 Pa. Commonwealth Ct. 593, 598, 403 A.2d 161, 163-64 (1979).

It is also well established under Pennsylvania law that the General Assembly cannot commit itself to the passage of any legislation, and cannot bind a future Assembly to exercise or not exercise legislative power. *Mott v. Pennsylvania Railroad Co.*, 30 Pa. 9 (1858); *see Commonwealth ex rel. Fortney v. Bartol*, 342 Pa. 172, 174-75, 20 A.2d 313, 314 (1941). And neither the Executive Branch, nor any attorney, can bind or agree to bind the General Assembly to pass or not pass legislation. *See Commonwealth ex rel. Fortney v. Bartol.*

Government in Pennsylvania is analogous to the federal government, with similar limitations. For the United States, as for Pennsylvania, the power of the Executive Branch is limited to recommending and enforcing laws; and it may not subject the lawmaking power of Congress to its control. Only Congress can pass laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952). Further, the Executive Branch may not act as a lawmaker in the absence of delegation of authority from Congress, *Independent Meat Packers Association v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976); *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981); and Congress may not delegate or abdicate to anyone the power to enact laws. *Crain v. First National Bank of Oregon, Portland*, 324 F.2d 532, 537 (9th Cir. 1963).

In the instant case the consent decree was initially entered into by the Executive Branch on the presumption that the Pennsylvania Vehicle Code, 75 Pa. Cons. Stat.

Ann. §4701 et seq. (Purdon 1977) (amended, Purdon Supp. 1984-1985), as it existed in 1978, granted authority to implement an emission inspection program. The consent decree did not, as it could not, require the General Assembly to enact legislation to implement the program. The Executive Branch, in entering into the consent decree, did not, as it could not, agree to the enactment of any future legislation. In entering into the consent decree, the Executive Branch agreed only to implement an emission inspection and maintenance program as authorized by existing legislation.

The Pennsylvania laws relied on by the Executive Branch in entering into the consent decree were subsequently challenged in the Pennsylvania courts. *Burd v. Commonwealth,* 66 Pa. Commonwealth Ct. 129, 443 A.2d 1197 (1982), *reversed sub nom. Scanlon v. Commonwealth,* 502 Pa. 577, 467 A.2d 1108 (1983). The litigation in the state courts resulted in the Pennsylvania Supreme Court's determination that existing Pennsylvania law provided no legislative authority to implement an emission inspection program and that the Executive Branch had no authority to enter into the consent decree.

Although the litigation which resulted in the consent decree arose under a federal statute (the Clean Air Act), the emission inspection program agreed to in the consent decree must necessarily be implemented and administered by Pennsylvania agencies under state law; and questions of state law and state agency authority necessarily arise. This Court has recognized that government is not simply a private litigant, nor is government partly public and partly private. *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 383-84 (1947). Any arrangement with a gov-

ernment entity is subject to the scope of the authority of that entity as established by law. *See id.* at 384. The Circuit Court reviewed the instant case exclusively in terms of federal law, 755 F.2d at 44 (21a), and ignored the implication of Pennsylvania laws defining the scope of authority to implement the consented to program.

The remarkable result is that the entire Commonwealth government is bound by a consent decree, entered into by the Executive Branch, to implement an emission inspection program *not* authorized by the Legislative Branch and found to be unauthorized by the Judicial Branch, which determined also that the Executive Branch had no authority to consent to such action. The decision of the District and Circuit Courts thus elevates the commitment of the Executive Branch above the limitations on the Legislative and Judicial Branches imposed by the State Constitution. The federal court decision essentially elevates the consent decree to the status of an act of the Legislature and provides that, under the aegis of the consent decree, state action can be compelled, even though the General Assembly, elected by the citizens of Pennsylvania, has never authorized such action to be undertaken. One branch of government usurps the power of the other two branches and essentially assumes control. The power and authority of the Legislative and Judicial Branches is deemed irrelevant and surplusage. The entire organization of state government is realigned. A government established by the state Constitution with three equal and independent branches is reformed to consist of one branch, which does not require legislation to implement any program. The Constitution of Pennsylvania, approved by the voters of the state (*see* Amendment XI, §1), is vacated

and rewritten. The republican form of government guaranteed by the United States Constitution, Article IV, §4, is subverted. The decision of the federal courts so significantly alters the concept of democratic, republican state government that it should, it must, be reviewed by this Court.

B. The Opinion of the Circuit Court Is in Conflict With the Decisions of the Fourth and Ninth Circuits Holding That Principles of Federalism Mandate That Federal Consent Decrees Should Be Vacated When in Conflict With State Law

In *Washington v. Penwell,* 700 F.2d 570 (9th Cir. 1983), the Ninth Circuit affirmed the vacating of portions of a consent decree, finding that state law applied and that there was no authority under state law for those vacated sections. The consent decree in that case, between Oregon prisoners and state prison officials, required accessible prison libraries and trained prisoner paralegals. The district judge subsequently determined that the consent decree involved an undertaking to fund legal services and concluded that the decree was unenforceable because the state officials lacked authority to bind the state to such a significant fiscal obligation. *Id.* at 572. On appeal the prisoners contended that the decree, although analyzed by the district judge under principles of contract law, was no longer a contract but a judicial act and that the state was thus bound by the power of the court, not the contract. The Ninth Circuit rejected this contention, holding that strict application thereof "would create an impermissible constitutional confrontation between the federal court and the state legislature." *Id.* at 573-74.

In *West v. Bank of Commerce & Trusts,* 167 F.2d 664, 666-67 (4th Cir. 1948), concerning the validity of a consent decree to which a city was a party, the court found that the city's attorneys had no authority to prohibit the legislative branch from exercising its powers, held that parties may not stipulate about statutes and that courts are required to disregard such stipulations, and ruled that ". . . the decree was not binding upon the city and could have been vacated or set aside on application by it. . . ." The principles articulated in *West* operate with equal force here. The decision of the Third Circuit is in clear conflict with these principles and creates precisely the kind of "impermissible constitutional confrontation" the Ninth Circuit avoided in *Washington v. Penwell.*

In the present case, the Pennsylvania Supreme Court held, as a matter of state law, that there was no authority to implement an I/M program and no authority to enter into the consent decree and that such power could not be conferred retroactively. *Scanlon,* 502 Pa. at 590, 467 A.2d at 1114-15 (41a to 42a). The Circuit Court's decision, in refusing to apply the general principles of contract law in interpreting a consent decree and in failing to apply the law of Pennsylvania, is in clear conflict with holdings of the Fourth and Ninth Circuits.

Pennsylvania does not dispute the general principles of res judicata and comity related by the Third Circuit. The Circuit Court has missed the real issue, however, and "put the rabbit in the hat" by contending that Pennsylvania is bound since a federal court consent decree is entitled to full faith and credit, 755 F.2d at 43-44 (18a to 21a). This may be so generally, but *not* where the state statute upon which the decree is based is later found defi-

cient. The Circuit Court's novel and unprecedented application of the doctrine of res judicata blindly ignores that the decree lacked any statutory authority and will wreak havoc on the republican form of government of the fifty states and the federal government.

The Circuit Court's decision, bluntly, permits Executive Branch officials, lawyers, or others simply to ignore federal and state law by entering into consent agreements which mandate programs and require the expenditure of money without any statutory authority. Under the Circuit Court's notion of res judicata, Pennsylvania is without recourse to challenge such actions. This is a highly disturbing and unprecedented action which this Court should review.

Moreover, res judicata has no application here. In the first place the Court of Appeals itself raised the issue for the first time in its opinion. The Court found that the issue of res judicata had not been presented to it (20a), for the issue had not been raised before the District Court, presented in the briefs, or addressed at oral argument. Res judicata must be raised in the District Court and may not be raised by the parties on appeal. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 n. 19 (1975); *Nevels v. Hanlon*, 656 F.2d 372, 375-376 (8th Cir. 1981); *Sartin v. Commissioner of Public Safety*, 535 F.2d 430, 433 (8th Cir. 1976); *Dellums v. Powell*, 566 F.2d 167, 177 n. 13 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Fed. R. Civ. P. 8(c). Under these circumstances, reliance by the Third Circuit on res judicata was clear error.

Second, a consent decree into which a governmental body enters without authority to do so cannot be regarded

as res judicata. *West v. Bank of Commerce & Trusts,* 167 F.2d at 667.

Finally, res judicata has no application here because there is no identity of parties or subject matter. The issue of state authority was never addressed by the federal courts prior to the state Supreme Court opinion, which found that there was no authority to implement the program or to enter into the consent decree.

C. The Circuit Court's Opinion Conflicts With Established Legal Principles and With the Decisions of This Court and of Other Circuit Courts

The decision of the Circuit Court is in conflict with the decisions of this Court and of other Circuit Courts on several issues. The issues are: (1) that state law applies in determining the validity of a consent decree, (2) that construction of a state statute and of state authority by a state Supreme Court is binding on the federal courts, (3) that the "four corners" doctrine applies to the interpretation of consent decrees, and (4) that government is not bound nor estopped by any agreement where there is a lack of authority to do or cause to be done what the law does not sanction or permit.

1. The opinion of the Circuit Court is in conflict with the well-established doctrine that general principles of contract law apply to the interpretation of consent decrees and with the holding of the Ninth Circuit that the law of the situs state applies in determining the validity of a consent decree.

There can be no dispute that general principles of contract law apply to the interpretation of consent decrees. *Collins v. Thompson,* 679 F.2d 168, 170 (9th Cir. 1982);

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); *United States v. Northern Colorado Water Conservancy District*, 608 F.2d 422, 430 (10th Cir. 1979); *Robinson v. Vollert*, 602 F.2d 87, 92 (5th Cir. 1979); *New York State Association for Retarded Children v. Carey*, 596 F.2d 27, 37 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979).

There can also be no serious dispute that the general principles of contract law of the situs state apply in determining the validity of the consent decree. *Washington v. Penwell*, 700 F.2d at 573; *Collins v. Thompson*, 679 F.2d at 170.

The opinion of the Circuit Court ignores the principles of contract law and is in conflict with well-established federal and state law.

2. The opinion of the Circuit Court is in conflict with the holding of the United States Supreme Court that the construction of a statute and of state authority by the state Supreme Court is binding on the courts of the United States.

After reviewing all law of the situs state relevant to the consent decree, the Pennsylvania Supreme Court, in *Scanlon*, clearly held the interpretation of state law by the parties to the consent decree, that there was authority to implement an emission inspection program, to be erroneous, and found no statutory authority to implement an emission inspection program and no authority to enter into the consent decree. 502 Pa. at 586-87, 467 A.2d at 1112-13 (38a).

The powers of the state, which include authority of its agencies and its personnel, flow purely from state law. These powers are a question of state law. *Arkansas v.*

Texas, 346 U.S. 368, 371 (1953); *Railroad Commission v. Los Angeles Railway,* 280 U.S. 145, 152 (1929). The construction of a statute and of state power by the state Supreme Court is binding on the courts of the United States, and the words of the state Supreme Court interpreting a state law become the words of that statute. *Simmons v. Saul,* 138 U.S. 439, 458 (1891); *Railroad Commission,* 280 U.S. at 152; *Marine National Exchange Bank v. Kalt-Zimmers Manufacturing Co.,* 293 U.S. 357, 363 (1934); *Stoner v. Fortson,* 379 F. Supp. 704, 709 (N.D. Ga. 1974).

The Circuit Court refused to follow the prior holdings of the United States Supreme Court by, in essence, overruling a decision on state law by the Pennsylvania Supreme Court that there was no state authority to implement an emission inspection program and no state authority to enter into the consent decree.

3. The disregard by the Circuit Court of the "four corners" doctrine presents a conflict with a prior holding of the United States Supreme Court.

The consent decree was entered into on the sole premise that the state statutes, as they existed in 1978, granted express authority to implement an emission inspection program. The state statutes assumed to grant that authority were 75 Pa. Cons. Stat. Ann. §4701 et seq. (Purdon 1977) (amended, Purdon Supp. 1984-1985), which contain the state authority to inspect vehicles. In *Scanlon,* the Pennsylvania Supreme Court held that those statutes did not contain any authority to implement an emission inspection program.

As stated in *Firefighters Local Union No. 1784 v. Stotts,* U.S. , 104 S.Ct. 2576, 2586 (1984), "The 'scope of a consent decree must be discerned within its

four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.' " In *Stotts,* the Supreme Court found that there was no express mention of layoffs in the consent decree; that the city did not intend to depart from the existing seniority system; and that, for any intention of the city to depart from the existing system, there would have been an express provision to that effect. U.S. at , 104 S.Ct. at 2586. In the present case, there is no commitment to the passage of any legislation within the four corners of the consent decree, and state law and constitutional government prohibit any such commitment. Any commitment to pass legislation, even though it would be invalid, would be so extraordinary that there would have been an express provision to that effect in the consent decree. There is no such express provision in the consent decree for this extraordinary and invalid commitment.

The Circuit Court failed to consider the four corners doctrine, even when presented with the holding of the Pennsylvania Supreme Court that there was no state authority to implement an emission inspection program or to enter into the consent decree.

4. The failure of the Circuit Court to follow the well-established law, that government is not bound or estopped by any agreement where there is a lack of authority or an agreement to do or cause to be done what the law does not sanction or permit, presents conflicts with the holdings of numerous other Circuit Courts.

There can be no dispute with the legal principle that an attorney cannot bind the General Assembly to pass any

legislation and any such a commitment, even though never made, would be beyond the authority of any attorney. The law is that the government it not bound by agreements of its agents acting beyond the scope of their authority, *Empire-Detroit Steel Division v. Occupational Safety & Health Review Commission,* 579 F.2d 378, 383 (6th Cir. 1978), and that one is presumed to be aware of all requirements and limitations when they deal with the government. *Rock Island, Arkansas & Louisiana Railroad v. United States,* 254 U.S. 141, 143 (1920). Rights held by the government cannot be given up by the unauthorized actions of government employees. *United States v. California,* 332 U.S. 19, 40 (1947). Government is not bound and not estopped by acts of its officers or agents in entering into an agreement to do or to cause to be done what the law does not sanction or permit. *Utah Power & Light Co. v. United States,* 243 U.S. 389, 409 (1917).

In *United States v. Beebe,* 180 U.S. 343 (1901), the Supreme Court invalidated a sixteen-year-old court order, finding that the United States Attorney who agreed to the order had no authority to do so. In *Naples v. Maxwell,* 368 F.2d 219 (6th Cir. 1966), *cert. denied,* 386 U.S. 971 (1967), the court vacated an order because of a lack of authority of a state attorney. The same principles that apply to attorneys and agents of the United States apply with equal force to those of *any* of the states. These same principles are in fact the law of Pennsylvania. *See, e.g., Central Storage & Transfer Co. v. Kaplan,* 37 Pa. Commonwealth Ct. 105, 116, 389 A.2d 711, 717 (1978), *aff'd,* 487 Pa. 485, 410 A.2d 292 (1979); *Commonwealth v. Seagram Distillers Corp.,* 379 Pa. 411, 417, 109 A.2d 184, 188 (1954); *Luzerne Township v. Fayette County,* 330

Pa. 247, 252, 199 A.2d 327, 330 (1938); *Commonwealth ex rel. Fortney v. Bartol,* 342 Pa. at 174-75, 20 A.2d at 314 (an agreement by an attorney, after a mandamus action, to have a municipal ordinance enacted was invalid and ineffective to bind a legislative body).

In *Scanlon,* the Pennsylvania Supreme Court held that there was no state authority to enter into the consent decree.

The opinion of the Circuit Court is in clear conflict with these state and federal court decisions.

D. The Circuit Court's Opinion Represents an Improper and an Unwarranted Application of the Full Faith and Credit Clause To Override and Impair Valid State Interests

The Circuit Court, through its unwarranted reliance on res judicata (discussed above in Section B), invoked the full faith and credit clause of the United States Constitution, Article IV, §1, 755 F.2d at 43-44 (18a to 21a), to override and to harm, significantly and substantially, valid state interests.

In holding that the judgments of the federal courts are binding on the Pennsylvania Supreme Court, the Third Circuit has unequivocally declared that the state laws implicated in the consent decree and the interpretation of those state laws by a state Supreme Court do not matter (21a). The Circuit Court, although never having previously considered the state statutes, has failed to give full faith and credit to the opinion of the state Supreme Court, the only court to have ruled on that state law, even though the construction of a state statute by a state Supreme Court is bind-

ing on the federal courts. These state laws, insofar as they bear upon the consent decree, are in effect superseded. Such a consequence is contrary to any purpose of the full faith and credit clause and to the directive of this Court that state interests "should be overriden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if state law is applied." *United States v. Yazell,* 382 U.S. 341, 352 (1966).

Here it is the "clear and substantial interests" of the state government which "will suffer major damage" if state law is *not* applied. Contrary to the premise of the Circuit Court that not vacating the consent decree poses no harm to the Commonwealth, 755 F.2d at 45 (23a), the harm is real and significant. The harm is to the basic structure of constitutional government, the legislative process, the budgetary process, the administrative organization and the integrity of the law itself.

As recognized by the Supreme Court in *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. at 383-84, government is not just another private litigant and is not partly public or partly private. The government holds its interest in trust for all the people and may not be deprived of those interests by ordinary court rules designed for private disputes. *United States v. California,* 332 U.S. at 40. Governmental interests encompass areas ranging from the State Constitution, constitutional government, the state statutes, and the democratic governmental interests of the people of Pennsylvania, to areas which involve interests in property. Even for governmental interests in property, these interests cannot be lost where there is a lack of au-

thority or where government agencies have been negligent. *Id.* The strong policy of protecting the public treasury from fraud and corruption was stated in *United States v. 32.40 Acres of Land,* 614 F.2d 108, 114 (6th Cir. 1980). The exercise of the police power of the state is such a crucial element of government that it cannot be contracted away or compromised. *Stone v. Mississippi,* 101 U.S. 814 (1880); *Northern Pacific Railway v. Minnesota,* 208 U.S. 583 (1908). In short, courts on numerous occasions have recognized the impairment of governmental interests that would result from lack of authority on the part of those signing for the government and have acted to prevent such impairment by vacating consent decrees or judgments devoid of such authority.

The harm to which the failure to vacate the consent decree exposes the state officials is aggravated by their being subject to court supervision in general in administering the I/M program. In particular, they are subject to a court-appointed master, to contempt motions by any plaintiff, to the requirement of court approval for changes in the emission inspection program. In addition, significantly at risk here is Pennsylvania's "ability to function effectively in a federal system." *Fry v. United States,* 421 U.S. 542, 547 n. 7 (1975). As long as the consent decree remains unvacated, its unavoidable effect is to "curtail in [a] substantial manner the exercise of [Pennsylvania's] powers," *Metcalf v. Mitchell,* 269 U.S. 514, 523 (1926), contrary to the principles of the federal system. The opinion of the Third Circuit also establishes an unacceptable precedent. This erroneous extension and application of the full faith and credit clause mandates review by the Supreme Court.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

JAY C. WALDMAN
General Counsel
Office of General Counsel
SPENCER A. MANTHORPE
Chief Counsel
Department of Transportation
JOHN W. CARROLL
Acting Chief Counsel
Department of Environmental Resources
JOHN M. HRUBOVCAK
Assistant Counsel
Department of Transportation
By: JOHN P. KRILL
Deputy General Counsel
Office of General Counsel
Attorneys for Petitioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNSEL FOR CLEAN AIR, *et al.*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

and

No. 77-0619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

ORDER

AND NOW, TO WIT, this 13th day of April, 1984, presently before the court is defendants' motion to vacate the consent decree entered into by the parties on August 30, 1978. The reasons advanced by defendants are insufficient to set aside a valid consent decree entered into by the parties many years ago and which arose out of an

intense adverserial atmosphere, an atmosphere which continues to exist to this present day. The consent decree, its ramifications, and plaintiffs' rights under the consent decree have been subject repeatedly to careful review and approval by both the Third Circuit Court of Appeals and the United States Supreme Court. This court refuses to put plaintiffs in a position whereby enforcement of the rights plaintiffs have acquired throughout this extensive litigation would be in defendants' hands. Accordingly, IT IS ORDERED that defendants' motion to vacate the consent decree is *denied.*

(s) Louis C. Bechtle
Louis C. Bechtle, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

and

No. 77-0619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

ORDER

AND NOW, TO WIT, this 26th day of April, 1984, in accordance with the provisions of Federal Rule of Civil Procedure 53(b), the court finds that an exceptional condition has emerged warranting the appointment by the court of a Special Master to assist and advise the court in respect to the within proceedings. That exceptional condition is the likely prospect that the defendants will not comply with a requirement of this court set forth in its Order of May 16, 1983, to the effect that by June 1, 1984,

the defendants shall cause the commencement of an auto emissions program for the Philadelphia/Allentown/Pittsburgh regions of the Commonwealth. The court incorporates herein by reference in support of its finding of an exceptional condition the findings and holdings in all previous decisions of record in this federal court proceeding.

Furthermore, the exceptional condition has arisen by reason of the presentation by the Commonwealth during the hearing held this day that the prospect of failing to proceed with the program by June 1, 1984, has been made more likely by the failure of the Commonwealth to either consider or adopt a series of reasonable and obvious alternatives in respect to what the Commonwealth has unconvincingly characterized as a scheduling inability which the Commonwealth concedes existed as far back as June 22, 1983, and which the Commonwealth Court found in its decision of April 25, 1984, to have been even earlier, on June 2, 1983.

The court empowers the Special Master to enter upon this matter for the purpose of making findings and recommendations to the court in respect to:

1. The formulation, adoption and status of regulations for emission analyzers, including the extent to which emergency regulations can be promulgated and adopted.

2. The present status and a periodic status of the purchase and sale of auto emission analyzers.

3. The present status and a periodic status of Commonwealth Phase II certifications of emission inspection stations.

4. The present status and a periodic status of delivery of auto emission analyzers to inspection stations.

5. The present status and a periodic status of the training and certification of personnel who will be part of the operating function of the program.

6. The status and progress of the presently scheduled advertising, public relations, and other indoctrination type of programs leading up to and beyond June 1, 1984.

7. The status and progress in regard to the consumer complaint stations in Pittsburgh, Allentown, and Philadelphia.

The Special Master shall have the power under this reference, in order to prepare his reports to the court, to travel to such places within and without the Commonwealth as his duties require, and to personally investigate by examination, study, or interview, any documents, places, or persons that the Special Master believes have the knowledge necessary for him to fulfill his duties. He shall further be empowered to apply to the court for the issuance of appropriate process, including subpoenas, to issue notices and commence the full range of discovery provided for under Federal Rules of Civil Procedure 26 to 36 inclusive, and to move the court for the imposition of sanctions under Federal Rule of Civil Procedure 37. The Special Master shall also have the right to convene hearings for the purpose of taking testimony, including the right to issue subpoenas in the name of the court for the appearance of persons whose testimony is required. The Special Master shall conform as nearly as possible to the procedures presently prevailing in the United States District Court for the Eastern District of Pennsylvania in respect to the convening of such hearings, including, whenever practicable, the convening of such hearings in the United States Courthouse at 6th and Market Streets, Philadelphia, Pennsylvania. The Special Master shall be au-

thorized to employ such administrative and support personnel as will allow him to fulfill the full range of duties authorized by this Order, including contracting for the services of court reporters in order to transcribe testimony which the Special Master believes must be preserved.

The court shall compensate the Special Master upon application by him at the rate that the court shall determine is fair and reasonable in accordance with prevailing standards for setting such rates in the United States courts. The Special Master is notified by this Order that the determination by the court will include an assessment by the court of an hourly rate that is appropriate for the Special Master in keeping with his knowledge, education, experience and skill, together with consideration by the court of the nature of the task performed by the Special Master in the fulfillment of his duties. In addition, the Special Master shall keep an accurate record of all out-of-pocket costs and expenses, including any necessary support costs for additional personnel, which record shall be submitted to the court separately.

By this Order the court appoints William J. Winning, Esquire, Suite 1200, 400 Market Street, Philadelphia, Pennsylvania 19106, as Special Master.

The court finds Mr. Winning is fully qualified to fulfill the duties governed by this Order. Mr. Winning is a graduate of the Villanova University School of Law, having graduated in 1973, following which he entered into public service which included five years with the United States Attorney's Office in the Eastern District of Pennsylvania, and he has been in private practice since 1978.

SO ORDERED.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 84-1332

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL., AMERICAN LUNG ASSOCIATION OF PHILADELPHIA, AND MONTGOMERY COUNTY, DELCHESTER LUNG ASSOCIATION, SIERRA CLUB, PENNSYLVANIA CHAPTER FRIENDS OF THE EARTH OF THE DELAWARE VALLEY, CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL, QUINN, KEVIN, FARRELL, KAYSI, WEISS, RUTH G. KLINKNER, JOHN, BIEZ, ELIZABETH S., SHULMAN, MONA

vs.

COMMONWEALTH OF PA., & TRAIN, RUSSELL, E., Ind. & as ADMINISTRATOR of the ENVIRONMENTAL PROTECTION AGENCY, ET AL., SHERLOCK, WILLIAM T., Individually and as Secretary of the PA Dept. of Transportation, GODDARD, MAURICE K., Individually and as Secretary of the PA Dept. of Environmental Resources, SNYDER, DANIEL J., III, Individually and as Regional Administrator of the Environmental Protection Agency, Region III

(D.C. Civil 76-2068)

UNITED STATES OF AMERICA

vs.

COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, SECRETARY

OF THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION; THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

(D.C. Civil 77-619)

Commonwealth of Pennsylvania, Secretary of Pennsylvania Department of Transportation and Secretary of Pennsylvania Department of Environmental Resources,
Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania

Argued
December 6, 1984

Before: ALDISERT, *Chief Judge,*
BECKER, *Circuit Judge,* and
STERN, *District Judge.**

(Filed February 11, 1985)

John M. Hrubovcak, Esquire (Argued)
Assistant Counsel
Spencer A. Manthorpe, Esquire
Chief Counsel

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* Honorable Herbert J. Stern of the United States District Court for the District of New Jersey, sitting by designation.

Commonwealth of Pennsylvania
Office of Chief Counsel
Department of Transportation
Harrisburg, Pennsylvania 17120

Counsel for Appellant Commonwealth of Pennsylvania

F. Henry Habicht, II, Esquire
Assistant Attorney General
Jacques B. Gelin, Esquire
Maria A. Iizuka, Esquire (Argued)
Department of Justice
9th & Penn Avenue, N.W.—Room 2339
Washington, D.C.

Counsel for Appellee United States

Jerome Balter, Esquire (Argued)
Public Interest Law Center of Philadelphia
1315 Walnut Street, Suite 1632
Philadelphia, Pennsylvania 19107

Counsel for Appellee Delaware Valley Citizens' Council

OPINION OF THE COURT

ALDISERT, *Chief Judge.*

The Commonwealth of Pennsylvania finds itself between a rock and a hard place. A consent decree entered in August 1978 by the federal court commands it to implement a vehicle emission inspection and maintenance program. At the same time, its own state court system by an order dated January 9, 1984, enjoins it from carrying out the federal decree. The January Pennsylvania

court order implemented a decision by that state's supreme court determining that the parties to the federal consent decree lacked the authority to consent to establishing and implementing an auto emissions inspection program and ordered that "an injunction should issue enjoining [the state] from performing the terms and conditions of the consent decree." *Scanlon v. Commonwealth of Pennsylvania*, 502 Pa. 577, 590, 467 A.2d 1108, 1115 (1983).

Bearing such formidable instructions from its own court system, the Commonwealth applied for relief in the district court under motions pursuant to Rule 60(b), Federal Rules of Civil Procedure, to vacate the 1978 consent decree.[1] The district court refused relief, and this appeal followed. We affirm.[2]

I.

Although our court is no stranger to this marathon litigation, *see* 674 F.2d 970 (3d Cir.), *cert. denied*, 458

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[1] Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application: or (6) any other reason justifying relief from the operation of the judgment.

[2] The Commonwealth's Notice of Appeal indicates that appellants also appeal from the district court's order of April 26, 1984 appointing a special master pursuant to Rule 53(b), F. R. Civ. P. This issue, however, was not addressed in appellants' brief, reply brief or at oral argument. Accordingly, we hold that appellants have waived this issue on appeal.

U.S. 1125 (1982), 674 F.2d 976 (3d Cir.), *cert. denied*, 459 U.S. 905 (1982), 674 F.2d 987 (1982), 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982), a brief chronology of the critical events surrounding the procedural history is necessary. The Delaware Valley Citizens' Council for Clean Air and others (Delaware Valley) and the United States separately sought a mandatory injunction in the federal courts to require Pennsylvania to implement a vehicle emission and maintenance program. Pennsylvania had failed to implement such a program as required by the federal Environmental Protection Agency (EPA). In August 1978 the Commonwealth parties entered into a consent decree with Delaware Valley and the United States obligating Pennsylvania to seek state legislation to establish a franchise inspection and maintenance system wherein the state would award contracts to individual persons to carry out the inspection function. The decree provided that if the necessary legislation were not enacted, the Pennsylvania Department of Transportation (PennDot) would, under its own authority, establish a private garage inspection and maintenance system whereby the Commonwealth would certify private facilities to perform the inspections. Pennsylvania's General Assembly did not so act and PennDot proceeded under the second alternative to establish a private garage system.

In April and June, 1980, various Pennsylvania state legislators petitioned in the district court to intervene, arguing that their rights as legislators were being usurped by the enforcement of the consent decree. The district court denied intervention. On appeal, this court affirmed, 674 F.2d 970 (3d Cir. 1982), determining that the proposed intervenors were not entitled to intervene as a matter of right under Rule 24(a)(1), Federal Rules of Civil Pro-

cedure, because the proposed intervenors failed to demonstrate that their interests were not adequately represented, and that the district court did not abuse its discretion in denying permissive intervention because of the untimeliness of the intervention petitions. The legislators' petition for certiorari was denied. 458 U.S. 1125 (1982).

In April 1981, Pennsylvania moved to modify the consent decree, seeking both an extension of time for implementation and a stay of the existing implementation order. The district court denied the motions and found that the Commonwealth was in violation of the consent decree. On appeal we affirmed, 674 F.2d 976 (3d Cir.), *cert. denied*, 459 U.S. 905 (1982). In June 1981, the Pennsylvania legislature enacted H.B. 456, 71 Pa. Cons. Stat. Ann. §523 (1981), which prohibited the expenditure of any funds for an emission inspection and maintenance program. In August 1981, various Pennsylvania state legislators filed actions in the state court seeking a declaratory judgment that the Pennsylvania parties lacked authority to enter into the federal court consent decree. In October 1981, Pennsylvania moved to modify the consent order in light of H.B. 456 and Delaware Valley moved to have the Pennsylvania parties declared in civil contempt and requested sanctions.

In January 1982, the district court denied Pennsylvania's motion to modify and found the Commonwealth, the Secretary of PennDot, and the Secretary of the Pennsylvania Department of Environmental Resources in civil contempt. As a sanction, the court ordered the Secretary of the United States Department of Transportation to refrain from approving any projects or awarding any grants for highways in areas in the Commonwealth covered by

the consent decree other than for the purposes of safety, mass transit, or transportation projects related to air quality improvement or maintenance. On March 5, 1982, the EPA proposed to withhold Clean Air Act funds—approximately $700,000—from PennDot and the Pennsylvania Department of Environmental Resources. The district court orders were affirmed by this court. 678 F.2d 470 (3d Cir. 1982). In affirming the district court, we asserted that the Commonwealth "itself was and remains bound by the consent decree," noting that the Pennsylvania Department of Justice, members of which were signatories of this decree, has the exclusive power to compromise and settle lawsuits against the Commonwealth. *Id.* at 475. Again the Supreme Court denied a petition for certiorari. 459 U.S. 969 (1982).

In May 1983, the Pennsylvania legislature enacted Act 3 of 1983, 75 Pa. Cons. Stat. Ann. §4706(b) (1983), which created an exception to H.B. 456, and permitted the establishment of an emission inspection and maintenance program when required by federal law and when necessary to avoid the loss of federal funds. Following enactment of this statute, the district court lifted the January sanctions.

In October 1983, the Pennsylvania Supreme Court held that the state officials had no authority to enter into the federal consent decree in 1978, ruled that the federal decree was "a nullity," 502 Pa. at 590, 467 A.2d at 1115, and remanded the case to its Commonwealth Court which, in January 1984, enjoined PennDot from respecting the terms of the federal decree. In March 1984, the Commonwealth asked the district court to vacate the 1978 consent decree under motions brought under Rule 60(b)(5) and

(6). The district court denied the motions in April 1984. This appeal followed.

II.

We review the district court actions involved here under an abuse of discretion standard. *United States Steel Corp. v. Fraternal Association of Steelhaulers,* 601 F.2d 1269, 1274 (3d Cir. 1979). Understandably, the Commonwealth appellants contend that the district court abused its discretion in refusing to open the consent decree, arguing that *Scanlon v. Commonwealth of Pennsylvania,* 502 Pa. 577, 467 A.2d 1108 (1983), compelled the district court to vacate the consent decree. Informed by its own court system that the federal consent decree was "a nullity," it asked to be relieved from the discomfort of being ordered by the federal court system to obey an injunction and ordered by its own state court system to ignore it. Because of the obvious comity sensitivities present, we are in the unfortunate position of analyzing a decision of the highest court of a sovereignty that in turn had analyzed a federal case and made a determination that the federal decree was null and void.

But it is not necessary for courts of two separate sovereignties to get into a "'tis! t'aint!" colloquy on the merits of this dispute. Rather, the resolution of this particular dispute turns on the efficacy of final judgments rendered by the federal court system.

This is not a diversity case in which the controlling legal precepts are found in the body of state substantive law. The consolidated cases were filed in the federal district court under the federal Clean Air Act, as amended, 42 U.S.C. §§7401-7642, which requires each state to submit a state implementation plan for the attainment and

maintenance of national ambient air quality standards for each air quality control region in the state. After the state failed to implement the emission inspection and maintenance program, the Delaware Valley group instituted a citizens' action on June 29, 1976, pursuant to 42 U.S.C. §7604, against the Commonwealth of Pennsylvania, the Secretary of the PennDot, the Secretary of the Pennsylvania Department of Environmental Resources, and the administrator and regional administrator of the Environmental Protection Agency. The plaintiffs requested an order to enforce the Pennsylvania state implementation plan requirement for the implementation of the program in the Philadelphia and Pittsburgh areas. After the EPA issued notices of violation to the Governor of Pennsylvania and the Secretary of PennDot, on February 18, 1977, the United States instituted its own suit against the Commonwealth of Pennsylvania and certain of its departments and officers pursuant to 42 U.S.C. §7413(b) to enforce the Pennsylvania implementation plan. Clearly the federal courts had federal question jurisdiction. It is equally clear that what was attacked collaterally in the state court system was a final federal court judgment and that the dispute implicated federal law.

Much of the Pennsylvania Supreme Court's rationale for its holding that the federal decree was a nullity stems from its conclusion that the Commonwealth could not be bound where the consent decree was signed only by the "counsel for Pennsylvania Department of Transportation' and "counsel for Pennsylvania Department of Environmental Resources." This appears to be a collateral attack on this court's prior holding in *Delaware Valley Citizens' Council for Clean Air vs. Commonwealth of Pennsylvania,* 678 F.2d 470, where we had the precise issue before us.

We determined that

> the Commonwealth itself was and remains bound by the consent decree. . . . By its terms "[t]he provisions of this Consent Decree apply to the Defendants Commonwealth of Pennsylvania, . . . and to each of the officers, agents, employees and successors of said parties." This Court has previously noted that the Pennsylvania Department of Justice, members of which were signatories of this decree, has the exclusive power to compromise and settle law suits against the Commonwealth. . . . And in this case, we have also recently noted that the Attorney General, who heads the Department of Justice, has represented the Commonwealth in this litigation from the time the complaint was filed, through the negotiation and signing of the consent decree, and up to the present.

678 F.2d at 475 (citations omitted). *See also Vecchione v. Wohlgemuth*, 426 F. Supp. 1297 (E.D. Pa.), *aff'd* 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977).[3] It scarcely need be reiterated here that the relief from a

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[3] There the district court noted:

> We would . . . be gravely concerned about any view that would bind us to regard a violation of the internal authorization procedures of the Commonwealth Department of Justice as a basis for invalidating a factual stipulation entered into in the course of litigation. The Justice Department's responsibility is to supervise its duly appointed assistant attorneys general during litigation and not years afterward, and to stand behind representations and stipulations which its legal representatives made in a court of law.

426 F. Supp. at 1308 n. 21.

decision of this court in a federal case can be obtained only from the United States Supreme Court and not from the Supreme Court of Pennsylvania.

Unsuccessful in the district court and this court, and rebuffed by the United States Supreme Court, members of the Pennsylvania legislature, as private litigants, attempted a collateral attack on the several final judgments of the federal courts—both trial and appellate. What was attempted in the state courts and the ostensible relief granted by the state's highest court, of course, flies in the face of settled law and the doctrine of *res judicata.* The issue is not novel. The attempt has been made before. But the United States Supreme Court has issued clear instructions when collateral attacks on final federal court judgments are attempted by state court systems:

> Congress . . . has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself. For the heart of the rule as declared by this Court is that:
>
> "[W]here the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . . . The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

Donovan v. City of Dallas, 377 U.S. 408, 413 (1964), quoting *Peck v. Jenness,* 7 How. 612, 625 (1849).

The Supreme Court of the United States is the final arbiter of conflicts between the several sovereignties under our federal system. Thus, although Congress implemented the Constitution's full faith and credit clause of Article IV, §1, in language referring only to state courts,[4] there "is a clearly established rule that state courts must give full faith and credit to the proceedings of federal courts[.] That this is the rule is beyond doubt, and the state courts have generally accepted it." Degnan, *Federalized Res Judicata,* 85 Yale L. J. 741, 744 (1976); *see also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4468 (1981) ("It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts. . ."). The Supreme Court has consistently assumed that the implementing statute requires such recognition. Thus, in *Embry v. Palmer,* 107 U.S. 3 (1882), the Court concluded that "the judgments

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[4] 28 U.S.C. §1738 provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, If a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, whenever rendered and whenever sought to be enforced." *Id.* at 10 (citations omitted). *See also Hancock National Bank v. Farnum,* 176 U.S. 640 (1900); *Supreme Lodge, Knights of Pythias v. Meyer,* 265 U.S. 30, 33 (1924). The precept has been most recently stated in 1938. In *Stoll v. Gottlieb,* 305 U.S. 165 (1938), the Court states that the implementing statute

> is broader than the authority granted by Article Four, section one, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances.

Id. at 170. We learn from Chief Justice Stone that the purpose of full faith and credit is to "establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered. . . ." *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 439 (1943). Like the commerce clause, the full and credit clause "became a nationally unifying force." *Id.* Although Chief Justice Stone was writing in a state-to-state context, the principle is as powerful in state-federal relations. We agree completely with Professor Degnan that "[w]ere there no such rule, it would be necessary to invent one—so invent it the Supreme Court did." Degnan, *Federalized*

Res Judicata, 85 Yale L. J. at 749. The rule that governs us today is succinctly stated by the Court in *Stoll:*

> [W]here the judgment or decree of the federal court determines a right under a federal statute, that decision is "final until reversed in an appellate court, or modified or set aside *in the court of its rendition.*"

305 U.S. at 170, quoting *Deposit Bank v. Frankfort,* 191 U.S. 499, 520 (1903) (emphasis supplied). "Any other conclusion strikes down the very foundation of the doctrine of *res judicata,* and permits the state court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal courts to protect all who come before them relying upon rights . . . established by the judgments of the Federal courts." *Deposit Bank v. Frankfort,* 191 U.S. at 520.

Obviously, the Pennsylvania Supreme Court did not consider the doctrine of *res judicata* in rendering the *Scanlon* decision. Perhaps the parties did not brief the issue there, as they have failed to do in this court. However, Pennsylvania courts have long recognized the principle that state courts are bound by the judgments of federal courts. *See London v. City of Philadelphia,* 412 Pa. 496, 499, 194 A.2d 901, 902-03 (1963) (once federal court validity acquired jurisdiction, its jurisdiction extended to all matters ancillary to the main cause of action and it would violate *res judicata* doctrine to permit relitigation of state claim in state court); *Bardo v. Commonwealth of Pennsylvania,* 40 Pa. Commw. 585, 587 n. 1, 397 A.2d 1305, 1307 n. 1 (1979) ("It is clear that a federal court decision is res judicata in subsequent state proceedings."). Quite clearly, the Commonwealth could have litigated in 1978 in the federal court issues presented before the state

court in *Scanlon*. But they elected not to do so. Having made that decision in 1978—for whatever reason—the Commonwealth today is bound by the federal judgment under *res judicata*, a doctrine recognized by the highest courts in both the federal and the Pennsylvania court systems.

Therefore, the case devolves to this. Only the federal courts have the power to determine the authority of federal court litigants, bringing suit under federal law, to enter into consent decrees approved by a federal court. The resolution of this dispute does not go to the substantive merits of the controversy, but it goes directly to basic jurisdictional powers of courts of separate sovereignties. Accordingly, although the Pennsylvania Supreme Court's discussion of state statutes and especially its motor vehicle code is impressive and erudite, jurisprudentially speaking, it is irrelevant to the overarching question of the competency of a state court to interfere with a final, federal court judgment bottomed on federal law.[5]

III.

We must now apply the foregoing precepts to review the district court's exercise of discretion. The Common-

[5] We are not presented in this appeal with a case arising solely from state substantive law. We only decide here the conclusive effect of a federal consent decree based on federal law. We are impressed, however, with the compelling legal reasoning embodied in a general rule proposed by Professor Degnan:

> A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.

Degnan, *Federalized Res Judicata*, 85 Yale L. J. at 773.

wealth's motion to vacate the consent decree was based on Rule 60(b)(5) or, alternatively, Rule 60(b)(6). We have held that Rule 60(b) "provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." *Mayberry v. Maroney*, 529 F.2d 332, 335 (3d Cir. 1978). Under Rule 60(b)(5) the Commonwealth is required to demonstrate that it was entitled to be relieved from the terms of the consent decree because "it is no longer equitable that the judgment should have prospective application". Under this rule relief is permitted for "any . . . reason [other than those enumerated in the preceding sections of the rule] justifying relief from operation of the judgment." F. R. Civ. P. 60(b)(6).

We now consider whether equities were present in such quantity so as to persuade us to determine that there was an abuse of discretion. We have previously emphasized that in signing a consent decree, the signatories make "a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment." *United States Steel Corp. v. Fraternal Association of Steelhaulers*, 601 F.2d 1269, 1274 (3d Cir. 1979). At oral argument counsel for the Commonwealth was asked to state for the record who he represented in these proceedings. We were informed that he represented the executive branch of the state government, including the Governor, the Secretary of PennDot and the Secretary of the Department of Environmental Resources. He was asked that if we were to grant the relief sought in this appeal whether Pennsylvania was prepared to return over one-half billion dollars of highway funds distributed by the federal government in reliance upon Pennsylvania's compliance with the consent decree. We were informed that there was no such intention. He was also asked that

if Pennsylvania were successful, did the state authorities intend to dismantle the emission inspection and maintenance program now in effect in the Philadelphia and Pittsburgh areas. We were told that there was no such intention. Under these circumstances, in addition to the settled law that a final federal court judgment based on federal law cannot be collaterally attacked by a state court, we find a profound lack of equities in the Commonwealth's position before the district court.

The judgment of the district court will be affirmed in all respects.[6]

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[6] We are confident that the Commonwealth will encounter no further interference with its respect of the federal court decree. It scarcely needs mention that in the event of a further attempt, the Commonwealth parties may avail themselves of remedies "to protect and effectuate [United States court] judgments" permitted under 28 U.S.C. §2283.

STERN, *District Judge*, concurring:

I wholeheartedly join in the majority opinion. I write only to emphasize what is, for me, the most important basis for decision.

We are confronted with an order from the court of a state enjoining compliance with the final orders of the courts of the United States.

The state's order is untenable not only because the prior federal order was res adjudicata, which it was, but because a state has no power to disturb any federal decree. This conclusion flows necessarily from the constitutional principles that structure "Our Federalism," and most particularly from the supremacy clause.

State courts are "destitute of all power" to interfere with the proceedings or decisions of the national courts. *Central National Bank v. Stevens*, 169 U.S. 432, 460-61 (1897) (exemption from interference by state judicial action is "essential" to the "independence and efficiency of United States courts); *see also Riggs v. Johnson*, 73 U.S. (6 Wall.) 166, 194-96 (1867) ("the Constitution itself becomes a mockery . . . if . . . the nation is deprived of the means of enforcing its own laws by the instrumentalities of its own tribunals"); *McKim v. Voorhies*, 11 U.S. (7 Cranch) 279, 280 (the state court has no jurisdiction to enjoin a judgment of the circuit court of the United States). The Constitution's full faith and credit clause is neither the source of this principle nor the best basis for today's decision. The clause addresses only relations between states, declaring that one state must respect the judicial proceedings of another state. U.S. Const. art. IV, §1.

The ultimate source for binding state courts to federal decrees is the supremacy clause, part of article VI, as it operates through article III. See 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4468 (1981). Article III gives to the Supreme Court and to congressionally created "inferior courts" the "judicial power" to decide certain "cases" and "controversies." U.S. Const. art. III, §§1, 2. Since 1792, finality of judgments has been recognized as an essential attribute of this federal judicial power to render decisions. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410, 413 (1792). The statutes enacted to implement the jurisdiction of the Supreme Court and of the lower federal courts, then, are statutes that contemplate entry of final judgments by the federal courts. By command of the supremacy clause, judges in

every state are bound by these statutes, which in turn give to the federal courts the power to render unassailable final judgments.

In my view, the courts of the Commonwealth of Pennsylvania were without power to enjoin compliance even with a federal court decree that was preliminary. Indeed, it is for this reason that the federal courts, as a matter of self-restraint, have developed the doctrine of comity so as not to interfere with pending state proceedings. *Younger v. Harris,* 401 U.S. 37 (1971); *see Huffman v. Pursue, Ltd.,* 420 U.S. 592, 604 (1974). Without that self-restraint, the courts of the nation could enjoin pending matters in the courts of the states—not merely as victors of a race to judgment rewarded with res adjudicata, but as the tribunals of a superior sovereign. If the state courts have no power to interfere with pending federal cases, it follows that they have no power to disturb a federal judgment that was final.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Eugene F. SCANLON, et al., Appellants

v.

COMMONWEALTH of Pennsylvania, DEPARTMENT OF TRANSPORTATION, et al., Appellees

James M. BURD, et al., Appellants

v.

COMMONWEALTH of Pennsylvania, DEPARTMENT OF TRANSPORTATION, et al., Appellees

[Reported 502 Pa. 577, 467 A.2d 1108 (1983)]

Supreme Court of Pennsylvania

Argued May 25, 1983

Decided Oct. 26, 1983

Reargument Denied Dec. 1, 1983

Certain members of General Assembly brought action for declaratory judgment and injunctive relief seeking to prevent the Department of Transportation from implementing automobile emission inspection and maintenance program to control air pollution in metropolitan areas of state. On General Assembly members' motions for summary judgment, the Commonwealth Court, Nos. 1506 and 1762 C.D. 1981, John A. MacPhail, J., 66 Pa. Cmwlth. 129, 443 A.2d 1197, denied motion. The same court thereafter entered decree finding that the Department had authority to establish, implement, and maintain program as called for by consent decree entered into in

connection with action commenced in United States District Court contemplating implementation of such program. Members appealed. The Supreme Courts, Nos. 4 and 5 M.D. Appeal Dockets 1983, Larsen, J., held that: (1) Department had no statutory authority to establish and implement automobile emissions inspection and maintenance program at time at which the Department entered into consent decree in connection with actions commenced in United States district court contemplating implementation of such a program, and purported agreement of the Department to do so was void, and (2) subsequently enacted statute permitting establishment of such program as necessary as to comply with valid decrees of United States courts, so as to avoid cutoff of federal transportation funds, could not validate retroactively the Department's consent to implement program.

Reversed and remanded.

Roberts, C.J., and Zappala, J., filed dissenting opinions and would have granted the Commonwealth's request for reargument.

1. Health and Environment

Pennsylvania Department of Transportation had no statutory authority to establish and implement automobile emissions inspection and maintenance program at time at which the Department entered into consent decree in action commenced in the United States district court, which decree contemplated implementation of such a program, and purported agreement of the Department to do so was void. 75 Pa. C.S.A. §§101 et seq., 4521, 4531, 4531 (a, b), 4701, 4702, 4702 (a), 6103.

2. Health and Environment

Inasmuch as Pennsylvania Department of Transportation had no statutory authority to establish and implement automobile emissions inspection and maintenance program at time at which the Department entered into consent decree in actions in United States district court contemplating implementation of such program, subsequently enacted statute permitting establishment of such program as necessary to comply with valid decrees of United States courts, so as to avoid cutoff of federal transportation funds, could not validate retroactively Department's consent to implement such a progrom. 75 Pa. C.S.A. §§101 et seq., 4702, 4706(a, b), 6103; 71 P.S. §523 (Repealed).

Michael T. McCarthy, Harrisburg, for appellants Scanlon, et al.

Allen C. Warshaw, Deputy Atty. Gen., for appellee Com.

John Hrubovcak, Harrisburg, for appellee Penndot.

Joseph W. Marshall, III, Philadelphia, for appellants Burd, et al.

OPINION

LARSEN*, Justice.

The record in this case reveals the following facts: On June 29, 1976, a lawsuit was filed against appellees, Pennsylvania Department of Transportation (Penndot),

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* This case was reassigned to writer on Sept. 20, 1983.

and Pennsylvania Department of Environmental Resources, et al., in the United States District Court for the Eastern District of Pennsylvania, by the Delaware Valley Citizens' Council for Clean Air.[1] The action was brought to enforce the inspection/maintenance auto emission regulation (40 CFR 52.2038), under the authority of the Clean Air Act, as amended, 42 U.S.C. §7401 et seq. Later, on February 18, 1977, a second lawsuit was brought against the appellees in the same court, by the United States of America,[2] to compel the implementation, maintenance, and enforcement of an inspection/maintenance auto emission program in certain particular counties in Pennsylvania under authority of Federal Law.[3] Eventually, the two cases were consolidated.[4]

On August 29, 1978, without adjudication of any of the issues raised, the actions were concluded by the entry of a consent decree agreed to by counsel for the parties to the lawsuits.[5] Under the terms and conditions of the con-

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[1] *Delaware Valley Citizens Council for Clean Air, et al. v. Commonwealth of Pennsylvania, et al.*, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 76-2068.

[2] *United States of America v. Commonwealth of Pennsylvania, et al.*, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 77-619.

[3] Clean Air Act, as amended, 42 U.S.C. §7413(b).

[4] Civil Action Nos. 76-2068 and 77-619, see notes 1 and 2.

[5] Mr. Justice Zappala's dissenting opinion is factually incorrect when it states that the Commonwealth of Pennsylvania is an active party in these proceedings. Although the Commonwealth of Pennsylvania was an original named party, these proceedings are based upon the consent decree which was signed only by the Pennsylvania Department of Transportation and the Pennsylvania Department of Environmental Resources. Addi-

sent decree, appellee Penndot was required to seek the enactment of enabling legislation for a franchise system of auto emission inspection and maintenance. In the event that such legislation was not obtained by July 1, 1979, or, if the parties agreed, by October 1, 1979, then appellee Penndot would immediately move toward implementation of a private garage system of inspection. The General Assembly failed to provide legislation for a franchise system and Penndot proceeded to arrange for implementation of a private garage system as agreed. On December 22, 1979, pursuant to the consent decree, appellee Penndot adopted final regulations for an auto emission inspection program.[6]

On March 7, 1981, the consent decree was modified to extend the time within which Penndot was to implement the private garage system. On May 21, 1981, the United States District Court refused Penndot's request for another extension of time and ordered that the inspection/maintenance program as set forth in the consent decree be established without further delay. On June 16, 1981, the District Court issued an additional order requiring appellees to have a fully operational program by May 1, 1982. Penndot proceeded to carry out the provisions of the consent decree which necessarily involved the expenditure of state monies. Final equipment standards were adopted and promulgated on October 10, 1981.[7]

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tionally, this matter was submitted to the lower court by stipulations of the parties and the only appellee parties who signed the stipulations were the Pennsylvania Department of Transportation and the Pennsylvania Department of Environmental Resources.

[6] 67 Pa. Code §177.1 et seq.

[7] 11 Pa. Bul. 3519 (1981).

On October 5, 1981, the General Assembly overrode a gubernatorial veto and enacted into law H.B. 456 which provided as follows:

> "Neither the department nor any other department or agency of the executive branch of state government shall expend any public funds for the establishment and administration of any system for the periodic inspection of emissions or emission system of motor vehicles." (1929, April 9, P.L. 177, Art. XX, §2013, added 1981, Oct. 5, P.L. 289, No. 99, §2; 71 P.S. §523).

After the passage of H.B. 456, Penndot ceased to implement the terms of the consent decree. As a result, on January 22, 1982, the United States District Court entered an order holding the Commonwealth in contempt.

In June and July of 1981, the present actions were initiated by the two groups of appellant-legislators, each group filing a separate petition for review in the Commonwealth Court.[8] Both suits allege that the appellee Penndot was not empowered by any legislation to enter into a consent decree committing the Commonwealth to the implementation of an auto emissions inspection/maintenance program. The actions aver that, without authorizing legislation, Penndot lacked the authority to: (1) establish and implement an auto emissions inspection program; (2) ensure enforcement of such a system; and (3) establish any subsidiary programs to a primary emissions program. In each lawsuit the appellants asked, *inter alia,* for a declaratory judgment ruling that Penndot did not have the power

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[8] *Burd, et al. v. Commonwealth, et al.*, No. 1506 C.D. 1981. *Scanlon, et al. v. Commonwealth, et al.*, No. 1762 C.D. 1981.

to establish, implement and maintain an inspection/maintenance auto emission program as contemplated by the consent decree; and further that an injunction issue, enjoining appellees from performing the terms and conditions of the consent decree without obtaining authorization from the legislature.

After the two cases were consolidated for trial, the Commonwealth Court entered a decree finding that the appellee Penndot had the authority to establish, implement and maintain an auto emissions inspection program as called for by the consent decree and denied appellants' prayer for relief. 66 Pa. Cmwlth. 129, 443 A.2d 1197. Appeal to this Court followed.

I.

[1] The appellants argue that appellees lacked the authority to establish and implement an auto emissions inspection program at the time they entered into the consent decree calling for such a program.

The appellee Penndot, on the other hand, argues that indeed it had authority to commit to the implementation of an emissions inspection program by virtue of Sections 4701, 4702(a), 4521, 4531 and 6103 of the Motor Vehicle Code[9] which Sections provide, in the order set forth, as follows:

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[9] Act of 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. 4701; Act of 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. 4702; Act of 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. §4521; Act of 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. §4531; Act of 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977; 75 Pa. C.S.A. §6103.

§4701. *Duty to comply with inspection laws*

No owner or driver shall refuse to submit a vehicle to any inspection and test that is authorized or required by the provisions of this chapter.

§4702. *Requirement for periodic inspection of vehicles*

(a) General rule.—The department shall establish a system of semiannual inspection of vehicles registered in this Commonwealth.[10]

§4521. *Promulgation of regulations by department*

The department shall promulgate regulations governing the number, size, color, type, construction, location and use of other equipment on vehicles consistent with but not limited by the provisions of this subchapter and taking into consideration different requirements for different classes or types of vehicles.

§4531. *Emission control systems*

(a) Compliance with established maximum levels.—No vehicle manufactured in compliance with the requirements of the Clean Air Act (77 Stat. 392, 42 U.S.C. §1857), or any amendments or supplements thereto, shall have emissions exceeding the maximum permissible levels prescribed by law.

(b) Limitation on alteration of system.—No person shall change or alter the emission control sys-

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[10] In 1982, Section 4702 was amended to provide for annual inspection of vehicles.

"Except as provided in subsection (b), the department shall establish a system of annual inspection of vehicles . . ."

tem of a vehicle in such a manner that it fails to comply with the prescribed emissions criteria. It is unlawful for the vehicle to be operated under its own power until a reinspection at an official inspection station establishes its full compliance.

§6103. *Promulgation of rules and regulations by department*

In addition to the specific powers granted to the department by this title to promulgate rules and regulations, the department shall have the power in accordance with the provisions of the act of July 31, 1968 (P.L. 769, No. 240), known as the "Commonwealth Documents Law," to promulgate, consistent with and in furtherance of this title, rules and regulations in accordance with which the department shall carry out its responsibilities and duties under this title.

None of the statutory provisions cited by the appellee Penndot empower it to implement an auto emissions inspection/maintenance program such as that which it agreed to implement in the Federal Court consent decree.

In considering Section 4701, it is helpful to examine its predecessor, Section 834 (75 P.S. §834) which provided:

"(a) Every owner of a motor vehicle . . . being operated in this Commonwealth, shall submit such motor vehicle to such inspection of its mechanism and equipment as may be designated by the secretary, *including such emission control systems and devices* for which the Secretary of Transportation, in consultation with the Secretary of Environmental Resources, had adopted inspection procedure and requirements

> which shall, to the extent possible and practical, be consistent with the requirements of the 'Clean Air Act' . . . These requirements shall not apply within ninety (90) days after they are adopted, shall not be changed oftener than once a year and *shall apply only to those motor vehicles as are required by Federal law or regulation to be equipped with such emission control systems and devices.* The inspection of such devices and systems shall commence on the first day of inspection periods. . . . Such emission control systems and devices shall be inspected once a year." (Emphasis added)

The language of Section 834(a) set forth above is not the original statutory language as adopted by the legislature in 1959. The provisions of Section 834(a) which immediately preceded Section 4701, became part of the statute by amendment in 1972. This 1972 revision demonstrates a legislative intent, at that time, to grant Penndot the authority to mandate auto emissions inspections, an authority it did not previously have. The legislature accomplished this end by including in the statute such phrases as: *"including such emission control systems and devices";* and *"inspection procedure and requirements which shall, to the extent possible and practical, be consistent with the requirements of the 'Clean Air Act' ";* and *"shall apply only to those motor vehicles as are required by Federal law or regulation to be equipped with such emission control systems and devices."* Section 834(a) was repealed by the General Assembly in 1976 when a comprehensive Motor Vehicle Code[11] was adopted. Among

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[11] Vehicle Code, 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. 101 et seq.

the provisions of the new code is Section 4701. Upon a reading of Section 4701, it is readily apparent that all references to emission control systems, emission control devices, inspection procedures and requirements, and the "Clean Air Act" were eliminated. The deletion of emissions systems language and "Clean Air Act" references evinces that the legislature intended to deny Penndot the authority to require emission systems inspections. "Change in the language of a statute ordinarily indicates a change in legislative intent." *Masland v. Bachman*, 473 Pa. 280, 374 A.2d 517 (1977). From 1959 to 1972 Penndot did not have authority to require auto emission systems inspections. By virtue of the amended Section 834(a), from 1972 to 1977 Penndot was empowered to administer such an inspection system. After the repeal of Section 834(a) and the adoption of Section 4701, Penndot was left without authority to order a system of auto emissions inspection. Section 4701 requires vehicle owners and drivers to submit their vehicles to any inspection and test authorized by chapter 47 of the Motor Vehicle Code.[12] We find that nothing contained in chapter 47 authorizes Penndot to establish and implement an auto emissions inspection system.

Section 4702((e) provides for a *semi-annual vehicle inspection system for all vehicles* registered *in Pennsylvania.* A program providing for *annual auto emissions inspections of certain types of vehicles* registered in a *limited number of counties* in the Commonwealth is not within the authority of Section 4702(a). Penndot does not have the power to modify or alter the extent of authority it statutorily receives from the legislature.

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[12] Chapter 47, Inspection of Vehicles, 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. §§4701 to 4732.

> It is the General Assembly, not the Executive Branch, which has been given the constitutional power to determine what programs will be adopted in our Commonwealth and how they will be financed. Although this may be done upon the recommendation of the Executive branch, the final determinations are legislative in nature. The Executive's function is to carry out those programs authorized by legislation.

Shapp v. Sloan, 480 Pa. 449, 469, 391 A.2d 595, 596 (1978).

Section 4521 provides Penndot with authority to regulate the type and kind of equipment which must be included in various classes of vehicles. No authority to implement an auto emissions inspection system is established by the provisions of this section. The right to prescribe equipment does not carry with it the power to mandate inspections.

Section 4531, although addressed to emission control systems, does not provide the inspection authority as contended by appellee Penndot. The provisions of 4531(a) require that all vehicles manufactured in compliance with the requirements of the "Clean Air Act" be equipped with an emissions control system that meets the specifications of the "Clean Air Act."[13] Section 4531(b) prohibits any alteration of the emissions control equipment which reduces its efficiency below the standard set by 4531(a). Neither 4531(a) nor 4531(b) vests Penndot with the authority to implement an annual system of inspection and testing of the required equipment. In addition Section 4531 applies to all vehicles throughout the entire Common-

[13] 77 Stat. 392, 42 U.S.C. §1857.

wealth manufactured in compliance with the Clean Air Act. It is not limited to certain types of vehicles registered in a small number of counties, regardless of whether the vehicles were manufactured in compliance with the Clean Air Act.

Section 6103 merely grants Penndot the general authority to promulgate rules and regulations in carrying out the specific powers granted it by statute. Section 6103 is only applicable when it is determined that Penndot has been authorized to act by some other provision of the code.

Clearly, at the time of the entry of the Federal Court consent decree, the appellee Penndot lacked the statutory authority to establish and implement the auto emissions inspection/maintenance program contemplated by that order. The desirability and merits of the system is not the question here; it is the extent of authority possessed by Penndot which is at issue. We hold that appellees simply did not have the authority to establish and implement such a system at the time it agreed to the consent decree, and thus had no authority to enter into the consent decree.

II

[2] While this appeal was pending, the legislature enacted Act 3 of 1983[14] which provides, in pertinent part, as follows:

> (a) General rule.—Except as provided in subsection (b) neither the department nor any other department or agency of the executive branch of State government shall expend any public funds for the

[14] 75 Pa. C.S.A. §4706(b), as amended.

establishment and administration of any system for the periodic inspection of emissions or emission systems of motor vehicles.

(b) Exception.—The provisions of subsection (a) shall not apply when the secretary shall certify that such system is required to comply with Federal law and is necessary for the Commonwealth to receive or avoid the loss of Federal funds in which case the department may establish and administer such a system for motor vehicles registered in areas where periodic inspection of emissions or emission systems of motor vehicles is required by the Environmental Protection Agency of the United States or decrees of the courts of the United States.

Subsection (a) is a restatement of the Act of 1981, Oct. 5, P.L. 289, No. 99, §2; 71 P.S. §523 prohibiting expenditures for any emission inspection program in the Commonwealth.[15] Subsection (b) provides an exception to the general prohibition mandated by subsection (a) and the previous Act of Oct. 5, 1981. Subsection (b) grants Penndot the authority to establish and administer an emissions inspection program whenever "the Secretary shall certify that such system is required to comply with Federal law and is necessary for the Commonwealth to receive or avoid the loss of Federal funds."[16] The Act goes on to further limit appellee's authority by providing that if the Secretary makes such a certification, then Penndot may implement an inspection system only in areas of the Commonwealth

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[15] Section 6 of Act 3 of 1983 repeals the Act of Oct. 5, 1981 (71 P.S. §523).

[16] Vehicle Code, 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. 101 et seq.

where periodic emissions inspections are (1) "required by the Environmental Protection Agency of the United States," or (2) required by "Decrees of the Courts of the United States."[17]

Penndot points to Act 3 of 1983 as evidence of its authority to agree to the implementation of an auto emissions inspection system as provided by the consent decree. It is argued that Act 3 of 1983 is a limiting statute which restricts the broad authority granted by Section 4702 of the Motor Vehicle Code and specifically sets forth the type of auto emission inspection program which may be established. We do not see Act 3 of 1983 as a limiting enactment in the sense advanced by the appellees. Rather Act 3 of 1983 is a statute, coerced by a Federal Court Order,[18] and delivered as ransom for the rescue of the citizens of Pennsylvania from the considerable financial distress

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[17] Vehicle Code, 1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977, 75 Pa. C.S.A. 101 et seq.

[18] By order dated January 22, 1982, the U.S. District Court for the Eastern District of Pennsylvania ordered, *inter alia*, as follows:

> "The Secretary of the United States Department of Transportation ("Secretary"), or his designee, *shall not approve* any projects *or award* any grants under Title 23 of the United States Code in the Philadelphia or Pittsburgh areas, as those areas are defined in §2(c)(VI) below, other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance. *See:* 42 U.S.C. §7506(a)."
>
> "The *Philadelphia Areas* shall consist of Philadelphia, Bucks, Montgomery, Chester and Delaware Counties; the *Pittsburgh Area* shall consist of Allegheny, Beaver, Butler, Westmoreland and Washington Counties; *See:* Consent Decree §§3(f), 3(g)."

caused by the withholding of million of dollars in taxpayers' funds ticketed for Pennsylvania highways. But for the freezing of these critical funds and their threatened permanent loss, it is fair to conclude that the "exception" provisions of Act 3 of 1983 would not have been even conceived, let alone enacted into law.

Nothing contained in the provisions of Act 3 of 1983 gives the appellee blanket authority to establish an emissions inspection program when and where such a system is deemed necessary or desirable. The authority vested here is circumscribed by the specific conditions set forth in Subsection (b). Act 3 of 1983 authorizes Penndot to establish and implement an inspection system for motor vehicles registered in areas where emission inspections are required by the environmental protection agency of the Federal government or by decrees of the Federal courts. In this case the inspection system Penndot seeks to implement is embraced by the terms of a consent decree of the United States District Court for the Eastern District of Pennsylvania. The decree relied upon here, however, fails to provide the necessary condition required to activate Penndot's authority. Act 3 of 1983 contemplates and refers to a *valid* decree based upon proper authority. Where the decree is a consent decree, as in the case here, proper authority includes the lawful ability and power of the parties to enter into the agreement. Penndot did not have the power to establish and implement an emissions inspection system as provided by the decree, and therefore, could not validly agree to the conditions of the consent decree. Furthermore, the legislature, by passing Act 3 of 1983, cannot validate retroactively Penndot's consent to implement an emissions inspection program which, at the time of its consent, was beyond its authority. *See: Hartle v. Long,* 5 Pa.

491 (1846). The unrestrained power to validate actions taken without authority tends to erode government by previously enacted laws and in its place substitute government by men acting without authority, whose illegal acts may subsequently be validated. The rights of society are better protected when they can only be affected by previously enacted laws. Our system of government rests upon the will of the people and the authority granted thereby as expressed in previously enacted legislation, and not upon the adoption of legislation to justify actions previously taken without authority. When action comes first and legislative authority later, we have strayed from constitutional government. *See: Horton v. Kyle*, 81 Fla. 274, 88 So. 757 (1921).

III

We conclude that at the time appellee Penndot agreed to the terms of the Federal Court consent decree providing for the implementation of an emissions inspection program, it did not have legislative authority to establish such a system. Because of the lack of authority, Penndot could not validly agree to establish and administer an inspection program and its purported agreement to do so is void. Further, we conclude that nothing contained in Act 3 of 1983 does or can retroactively vest appellees with the requisite authority. In addition, the exception provided for in subsection (b) of Act 3 of 1983 has no application to the Federal Court consent decree under the facts in this case, in that the appellees' agreement thereto is a nullity. Accordingly, and consistent with our holding that Penndot lacked the authority to consent to establish and implement an auto emissions inspection program, an injunction should issue enjoining appellees from performing the terms and conditions of the consent decree.

The decree of the Commonwealth Court is reversed and the case remanded for proceedings consistent with this opinion.

ROBERTS, C.J., and ZAPPALA, J., file dissenting opinions.

NIX and HUTCHINSON, JJ., did not participate in the consideration or decision of this case.

ROBERTS, Chief Justice, dissenting.

I dissent.

The Commonwealth Court was manifestly correct in holding that appellee Department of Transportation had the requisite statutory authority to implement the inspection system required by the terms of the consent decree into which appellees validly entered. See *Burd v. Department of Transportation,* 66 Pa. Cmwlth. 129, 133-135, 443 A.2d 1197, 1199-1200 (1982). It is unnecessary to address the effect of the initial version of 75 Pa. C.S. §4706 (71 P.S. §523), which prohibited the expenditure of public funds "for the establishment and administration of any system for the periodic inspection of emissions or emission system of motor vehicles." Not only was that statute enacted after the entry of the consent decree, but it has since been amended to authorize appellee's expenditure of funds on an inspection system which is certified as being required by federal law and necessary to the Commonwealth's receipt of federal funds, 75 Pa. C.S. §4706(b), clearly the circumstance of this case. Accordingly, the order of the Commonwealth Court, which denied appellants' motions for summary judgment, should be affirmed.

ZAPPALA, Justice, dissenting.

This is an appeal from an Order of the Commonwealth Court denying Appellants' petitions for declaratory and injunctive relief. The Appellants in these consolidated cases are members of the Pennsylvania General Assembly. They instituted these actions to challenge the authority of the Appellee, Department of Transportation (PennDOT), to establish and implement an automobile emission inspection and maintenance (I/M) program.

PennDOT had taken steps toward developing such a program to control air pollution in the Pittsburgh and Philadelphia areas as a result of two suits brought in the United States District Court for the Eastern District of Pennsylvania. Those actions, brought by the Delaware Valley Citizens Council for Clean Air and by the United States Environmental Protection Agency (EPA) against the Commonwealth, PennDOT, and the Department of Environmental Resources (DER), sought enforcement of the I/M provision of the state's implementation plan (SIP), required by the Clean Air Act, as amended, 42 U.S.C. §7410(a)(2)(G). The suits were settled in August of 1978 when the parties entered into a consent decree.

According to the terms of this consent decree, PennDOT was to seek legislative approval for a franchise system of emission inspections or, in the event of failure to obtain such approval, to implement a private garage inspection system under its own authority. When the General Assembly failed to pass the franchise system legislation proposed by PennDOT, the Department promulgated regulations and standards for the private garage system, to take

effect under the modified consent decree by May 1, 1982. In October of 1981, the General Assembly passed, and overrode the governor's veto of, House Bill No. 456, which prohibited PennDOT or any other executive agency from spending "any public funds for the establishment and administration of any system for the periodic inspection of emissions or emission system of motor vehicles." 75 Pa. C.S. §4706 (1981) (amended 1983). Having thus been disabled from proceeding with the I/M program, PennDOT sought a stay of the consent decree in the federal actions. The stay was denied, and upon motion of the plaintiffs the Commonwealth was found in contempt for failure to proceed with implementation of the program. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 533 F. Supp. 869 (E.D. Pa. 1982), *aff'd,* 678 F.2d 470 (3rd Cir. 1982); *cert. denied,* U.S. , 103 S.Ct. 298, 74 L.Ed. 2d 280 (1982).

In these actions, the Appellants sought to establish that PennDOT at all times lacked the authority to implement an I/M program or to consent to such a program on behalf of the Commonwealth. The Commonwealth Court concluded to the contrary, finding that under §4531 of the Motor Vehicle Code, Title 75, Pa. C.S., PennDOT "had the statutory authority to implement an auto emission inspection maintenance program at the time it entered into the consent decree in the Federal District Court." Because of the effects of House Bill No. 456, the court found no threat of irreparable harm and therefore denied the injunctive relief as well.

Subsequent to the Commonwealth Court's decision, and the filing of this appeal, the General Assembly enacted

Act 3 of 1983. While maintaining the prohibition on expenditure of funds for emissions inspection programs as the general rule of 75 Pa. C.S. §4706, Act 3 added as an exception that such prohibition "shall not apply when the secretary [of transportation] shall certify that such system is required to comply with Federal law and is necessary for the Commonwealth to receive or avoid the loss of Federal funds," and affirmatively provided that in such a case "the department may establish and administer such a system for motor vehicles registered in areas where periodic inspection of emissions systems of motor vehicles is required by the Environmental Protection Agency of the United States or decrees of the court of the United States."

A Majority of this Court today holds that the Department did not have the authority to enter into the consent decree, that the decree is invalid, and that the Department does not presently, under Act 3, have authority to implement the I/M program. I most vigorously dissent.

The first and perhaps most fundamental error of the Majority Opinion occurs in the introductory sentence. There it is stated that the record reveals the "fact" that a suit was filed in federal court "against appellees, Pennsylvania Department of Transportation (Penndot), and Pennsylvania Department of Environmental Resources, et. [sic] al." Slip opinion at 1. What is stated is true as far as it goes. The Majority errs by what it does not state. Even a cursory glance at the record of the federal court actions makes it clear that those cases involved, *as separate defendants,* the Commonwealth of Pennsylvania; the Department of Transportation and the Secretary of the Department; and the Department of Environmental Resources and the

Secretary of that Department. The captions and innumerable references in the Opinions and Orders entered in the course of that litigation indicate that the Commonwealth was the primary defendant in those cases. In affirming the District Court's order holding the Commonwealth in contempt, the Court of Appeals for the Third Circuit noted that a motion to intervene filed by two groups of state legislators had been denied, which denial had been affirmed with the holding that the interests of the legislators were adequately represented by the Commonwealth defendants. *Delaware Valley Citizens Committee for Clean Air, et al. v. Commonwealth of Pennsylvania, et al.*, 678 F.2d 470, 474 (3rd Cir. 1982); *cert. denied*, U.S. , 103 S.Ct. 298, 74 L.Ed. 2d 280 (1982). The Court also noted that the "Pennsylvania Department of Justice, members of which were signatories of this decree, has the exclusive power to compromise and settle lawsuits against the Commonwealth," [*see* 71 P.S. §293 (Repealed 1980, Oct. 15, P.L. 950, No. 164, §503 imd. effective)] and that "the Attorney General, who heads the Department of Justice, has represented the Commonwealth in this litigation from the time the complaint was filed, through the negotiation and signing of the consent decree, and up to the present." 678 F.2d at 475. The Court further stated in unmistakable language "that the Commonwealth itself was and remains bound by the consent decree." *Id.* The Majority conveniently ignores the fact that the federal courts had before them as defendants not only the two[1] agencies

[1] The actions which are the subject of this appeal were brought against both PennDOT and DER, but were discontinued as to DER on August 28, 1981. The removal of DER as a defendant in these actions does not, however, permit decision of the

involved in the case at bar, but also the Commonwealth itself.

The importance of this misstatement of fact becomes immediately obvious in the next paragraph where the Majority indicates that "the actions were concluded by the entry of a consent decree agreed to by counsel for the *parties* to the lawsuits." Majority opinion at 1109 (Emphasis added). If, as the Majority implies, the party defendant was simply PennDOT, then the question addressed by the Majority, whether that agency had authority to establish an I/M system at the time it entered into the consent decree, might indeed be the relevant question. If however, as was found by the federal courts, the Commonwealth itself was the party defendant, then regardless of the intragovernmental processes necessary to comply, the Commonwealth itself, not just the agencies or the executive, but the entire state government, became bound by the consent decree. The Court of Appeals in an early challenge to the authority of the Environmental Protection Agency to enforce the requirements of the Clean Air Act and the State Implementation Plan by proceeding directly against the Commonwealth, held that such enforcement was valid. *Commonwealth of Pennsylvania v. Environmental Protection Agency*, 500 F.2d 246 (3rd Cir. 1974). The Court made clear its awareness that in permitting the EPA to enforce the SIP by acting against the Commonwealth itself, the processes of all branches of the Commonwealth government were implicated.

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actions by reference only to statutory enactments concerning PennDOT. The legislative program for enforcement of air pollution policy must be read as a whole, and all statutes in that regard must be read *in pari material*. See 1. Pa. C.S. §1932.

> It is also true that compliance with the plan will require the Commonwealth to exercise its *legislative and administrative* powers, for that is the means by which a state regulates its transportation system. However, it must not be forgotten that when dealing with the commerce power, 'we are guided by practical considerations' (citation omitted). In enacting the Clean Air Amendments of 1970 Congress created an interlocking governmental structure in which the Federal Government and the states would cooperate to reach the primary goal of the Act . . . Under its provisions, state and local governments retain responsibility for the basic design and implementation of air pollution strategies, subject to approval and, if necessary, enforcement by the Administrator. We believe that this approach represents a valid adaption [sic] of federalist principles to the need for increased federal involvement.

500 F.2d at 262 (emphasis added). *See also, Delaware Valley Citizens Council v. Commonwealth,* 678 F.2d at 476. As a matter of Federal law then, the Commonwealth itself, through all its branches, must enforce the requirements of the Clean Air Act and Pennsylvania's SIP. [It must be noted that although the *Commonwealth* challenged a particular requirement of the SIP in that case, the part of the plan requiring the Commonwealth "to establish an inspection system for certain motor vehicles to ensure that they do not emit carbon monoxide and hydrocarbons above the level prescribed by EPA . . . [was] not challenged by the petition for review." *Id.* at 249.] It is against this background that the present case must be examined.

The Majority reviews the legislative history of various sections of the Motor Vehicle Code, additions and deleitons, and concludes that "the deletion of emissions systems language and 'Clean Air Act' references evinces that the legislature intended to deny Penndot the authority to require emission systems inspections." Majority opinion at 1112. I cannot agree with this conclusion. Section 4521 of Title 75, the initial section of Subchapter B, "Safety and Anti-Pollution Equipment", assigns to PennDOT the duty to

> promulgate regulations *governing the* number, size, color, type, construction, location and *use of other equipment* on vehicles *consistent with but not limited by* the provisions of this subchapter and *taking into consideration different requirements for different classes or types of vehicles.* (Emphasis added.)

Section 4531 (b) provides that

> No person shall change or alter the emission control system of a vehicle in such a manner that it fails to comply with the prescribed emissions criteria. It is unlawful for the vehicle to be operated under its own power until a *reinspection* at an *official inspection station* establishes its full compliance. (Emphasis added.)

The above-quoted, emphasized language supplies sufficient indication that PennDOT, even after the 1976 changes in the statutory language noted by the Majority, had the authority to set emissions criteria, require emission control equipment, and require inspections to establish compliance. Although the deleted language had made such authority explicit by retaining the language of Sections 4521

and 4531 after the deletions the legislature acknowledged the continued existence of the Department's authority in this regard. It would be absurd for the legislature to have granted PennDOT authority to set requirements for emissions equipment, to make unlawful the tampering with such equipment and the operation of a vehicle until *re*-inspection establishes full compliance, and yet to have denied the authority to inspect such systems for tampering or compliance in the first place. At a minimum such authority must be recognized in PennDOT's power to "promulgate regulations . . . consistent with but not limited by the provisions of this subchapter". 75 Pa. C.S. §4521. It is a basic rule of statutory construction that the legislature does not intend an absurd result. 1 Pa. C.S.A. §1922(1). (Contrary to the assumption of the Majority, the change in language does not necessarily indicate a change in intent. The deletion of language is also consistent with the view that because that authority described by the deleted language was adequately spelled out by other statutory language, the language was no longer necessary. Such a view is particularly worthy of consideration when the deletion and change in language occurs as a result of the consolidation of statutes in a comprehensive Motor Vehicle Code.) We must, therefore, interpret the Motor Vehicle Code as having established in PennDOT the duty to promulgate the challenged regulations.

This interpretation is further supported by reference to 35 P.S. §4001 *et seq.*, the Air Pollution Control Act, 1960, Jan. 8, P.L. (1959) 2119, *as amended* 1972, Oct. 26, P.L. 989, No. 245, §1. In that Act the Department of Environmental Resources, a party defendant in the fed-

eral litigation, is given the power to "[r]equire the owner or operator of any air contamination source to sample the emissions thereof in accordance with such methods and procedures and at such locations and intervals of time as the department may reasonably prescribe and to provide the department with the results thereof." 35 P.S. §4004 (2.3). Air contamination source is previously defined in the Act as "[a]ny place, facility or equipment, *stationary or mobile,* from . . . which there is emitted . . . any air contaminant." 35 P.S. §4003(7). (Emphasis added). DER is further given authority to "[e]valuate motor vehicle emission control programs with respect to their effect on air pollution and determine the need for modifications of such programs." 35 P.S. §4004(10.1). Finally, the Environmental Quality Board of DER has the power to "[r]ecommend to the Secretary of Transportation performance or specification standards, or both, for emission control systems and devices on motor vehicles." 35 P.S. §4005(4). It would be anomolous indeed if the legislature granted DER authority to require the owners of cars to submit them for emissions inspections, to evaluate emissions control programs, and to recommend emission control systems standards to the Secretary of Transportation, and yet, along with all the previously enumerated powers of the Department of Transportation, withheld from that department the authority to implement an emission control inspection/maintenance program.

At the very least, these powers of DER refute the argument advanced in Part II of the Majority Opinion that, in the federal litigation, the proper parties were not before the court and could not lawfully bind the Commonwealth to the terms of the consent decree. The deputy attorneys

general who signed that decree clearly had authority to act on behalf of the Commonwealth itself, and as agents of the Department of Justice adequately represented the interests of the Commonwealth in those proceedings.

The Majority's discussion of the effect of Act 3 of 1983, 75 Pa. C.S. §4706(b), as amended, compounds the error previously noted. That Act provides that PennDOT may establish and administer an I/M program where required by EPA of the federal courts "when the secretary shall certify that such system is required to comply with Federal law and is necessary for the Commonwealth to receive or avoid the loss of Federal funds." The Majority, relying on its analysis that PennDOT did not have authority to enter into the consent decree, declares that the decree was not a valid decree based upon proper authority. Because Act 3 contemplates such a decree as a pre-requisite for the establishment of an I/M program, says the majority, the conditions of Act 3 have not been met and the program is enjoined.

It is incomprehensible that a Majority of this Court could hold that a decree entered by another court, which court has authority to determine its own jurisdiction, is invalid, thereby abandoning accepted principles of judicial comity. The Majority further errs in concluding that because the decree is invalid the program must be enjoined. This conclusion ignores the alternate basis for implementation of an I/M program set out in Act 3, "when it is required by the Environmental Protection Agency of the United States." The record makes it abundantly clear that the I/M program which was the subject of the federal litigation is required by federal law, by Pennsylvania's SIP,

and by EPA regulations, and that the federal court action was only a means of enforcing those requirements. PennDOT clearly has the authority to implement the challenged program following the enactment of Act 3 of 1983. Indeed, this intervening change in the applicable law has made moot this entire appeal, for by "granting" PennDOT the authority to implement an I/M program of the type challenged under conditions which undeniably exist, the legislature has resolved the only issue raised by the Appellants. *See generally, In Re Gross,* 476 Pa. 203, 382 A.2d 116 (1978).

Despite the self-serving protestations to the contrary ("The desirability and merits of the system is [sic] not the question here; it is the extent of the authority possessed by PennDOT which is at issue." Majority opinion at 1113), the Majority Opinion belies a clear intent to rewrite both federal and state environmental law according to the conceptions of the Majority. In its zeal to fend off the "coercion" of the federal court and redeem the "ransom" paid by the citizens of the Commonwealth for the release of their captive tax dollars, the Majority adopts only those facts of record which support its position and discards those which implicate a different result. The federal government through its several branches, and the state government through its several branches, over the years have established the applicable policies in regard to air pollution, the means by which those policies are to be implemented, and the authorities responsible for their implementation and enforcement. The Commonwealth, through enactments of several sessions of the General Assembly, has delegated the authority to bring the Commonwealth into compliance with the requirements of federal

law to two agencies. To allow a select group of disenchanted legislators and former legislators to overturn duly enacted legislation and regulations by resort to an action such as the present one is to abandon constitutional government and the stability it promises in the face of continuous changes in personnel, and to substitute anarchy, government changing with the whims and caprices of those who happen to gain control for the moment. I cannot subscribe to this total abandonment of our traditions of governmental order.

I would dismiss the appeals as moot.

SUPREME COURT OF PENNSYLVANIA
Middle District

434 Main Capitol Building
P. O. Box 624
Harrisburg, Pennsylvania 17108
(717) 787-6181

December 2, 1983

Allen C. Warshaw, Esquire
Office of the Attorney General
15th Floor—Strawberry Square
Harrisburg, Pa. 17120

Re: Scanlon, et al., Burd, et al., Appellants v. Commonwealth, Department of Transportation, et al.
Nos. 4 & 5 M.D. Appeal Dockets 1983

Dear Mr. Warshaw:

This is to advise that the following Order has been entered on the Application for Reargument filed in the above-captioned matter:

"December 1, 1983.
Application denied. s/ Per Curiam.
Mr. Chief Justice Roberts and Mr. Justice Zappala dissent and would grant the Commonwealth's request for reargument."

Very truly yours,
(s) Mildred E. Williamson
Deputy Prothonotary

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

No. 1506 C.D. 1981

JAMES M. BURD, et al.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, et al.,

Respondents

No. 1762 C.D. 1981

EUGENE F. SCANLON, et al.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, et al.,

Respondents

ORDER

NOW, January 9, 1984, the Supreme Court of Pennsylvania having stated that "consistent with our holding that PennDOT lacked the authority to consent to establish and implement an auto emissions inspection program, an injunction should issue enjoining appellees from performing the terms and conditions of the consent decree,"

Scanlon v. Commonwealth of Pennsylvania, Pa. , A.2d (Nos. 4 and 5 M.D. Appeal Dkt. 1983, filed October 26, 1983), slip op. at 16, and the Supreme Court having remanded the case to this Court for proceedings consistent with its Opinion, it is found, declared and ordered that:

(1) Respondents did not have the requisite authority to enter into the Consent Decree, as well as its subsequent modifications, signed and entered by the Federal Court in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 533 F. Supp. 869 (E.D. Pa. 1982), *aff'd,* 678 F.2d 470 (3d Cir. 1982).

(2) Respondents do not have the requisite authority to carry out the terms and conditions of the Consent Decree, as well as its subsequent modifications, signed and entered by the Federal Court in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania.*

(3) Respondents' agreement to enter into and carry out the terms and conditions of the Consent Decree, as well as its subsequent modifications, signed and entered by the Federal Court in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania* is void.

(4) From the date of this Order, Respondents shall cease *all* activities associated with the carrying out of the terms and conditions of the Consent Decree, as well as its subsequent modifications, signed and entered by the Federal Court in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania.*

(5) Respondents are permanently enjoined from carrying out the terms and conditions of the Consent De-

cree, as well as its subsequent modifications, signed and entered by the Federal Court in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania.*

(6) Nothing herein shall be construed to restrict or in any manner affect prospectively respondents' authority granted under Section 4706 of the Vehicle Code, *as amended,* 75 Pa. C.S. §4706.

(s) James Crumlish, Jr.
James Crumlish, Jr.
President Judge

Date: January 9, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

CONSENT DECREE

WHEREAS, the United States Environmental Protection Agency (hereinafter "EPA") promulgated a transportation control plan for the Metropolitan Philadelphia and Southwest Pennsylvania Air Quality Control Regions on November 28, 1973 for the purpose of attaining the primary health-related ambient air quality standards for photochemical oxidants and carbon monoxide in the two regions;

WHEREAS, said transportation control plan included the requirement that the Commonwealth of Pennsylvania establish a mandatory inspection/maintenance program for light-duty and medium-duty vehicles in the two regions, 40 CFR Section 52.2038;

WHEREAS, Plaintiff Delaware Valley Citizens' Council for Clean Air, and other Plaintiffs, both organizational and individual, instituted Civil Action No. 76-2068 against the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation (hereinafter "PennDOT") the Secretary of the Pennsylvania Department of Environmental Resources (hereinafter "PennDER"), the Administrator and Regional Administrator of EPA to enforce the inspection/maintenance regulation, under the authority of the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.*, on June 29, 1976;

WHEREAS, EPA issued Notices of Violation to the Governor of Pennsylvania and the Secretary of PennDOT on September 23, 1976, under the authority of Section 113(a)(1) of the Clean Air Act, as amended 42 U.S.C. 7413(a)(1), for their failure to implement the inspection/maintenance regulation;

WHEREAS, Plaintiff United States instituted Civil Action No. 77-619 against the Commonwealth of Pennsylvania and certain of its departments and officers on February 18, 1977 under the authority of Section 113(b) of the Clean Air Act, as amended, 42 U.S.C. 7413(b);

WHEREAS, pursuant to a Stipulation entered into by the Plaintiffs in Civil Action No. 76-2068 and EPA on February 16, 1977, EPA was dismissed as a Defendant in that action upon the filing of Civil Action No. 77-619;

WHEREAS, extensive pre-trial motions and discovery proceedings have taken place in these actions, including oral argument of summary judgment motions by all parties on July 21, 1977, several sets of written interrogatories, and oral depositions of 14 employees of the Commonwealth of Pennsylvania;

WHEREAS, the parties agree that the entry of this Consent Decree is the most beneficial means to resolve this litigation;

WHEREAS, this Consent Decree is entered without the adjudication of any issues of fact or law.

NOW THEREFORE, before the taking of any testimony upon the pleadings and upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED:

1. This Court has jurisdiction of the subject matter of these actions and of the parties hereto.

2. The provisions of this Consent Decree apply to the Defendants Commonwealth of Pennsylvania, Secretary of PennDOT and the Secretary of PennDER, to all Plaintiffs and to each of the officers, agents, employees and successors of said parties.

3. The following definitions apply to this Consent Decree:

A. Inspection—the testing of the exhaust emissions of a vehicle by means of the insertion of a probe of an emission analyzer or similar instrument into the tailpipe of the vehicle while its engine is operating.

B. Maintenance—the repair or adjustment of a vehicle in order to reduce the level of its exhaust

emissions below exhaust emission standards prescribed by the Commonwealth.

C. Inspection/maintenance program—a program to reduce subject vehicle exhaust emissions by annually identifying vehicles that require maintenance and requiring that such maintenance be performed.

D. Private garage system—an inspection/maintenance program in which the Commonwealth certifies a number of privately-owned facilities to perform the inspection of vehicles.

E. Franchise system—an inspection/maintenance program in which the Commonwealth enters into a contract with a single person or entity to establish and operate the inspection aspects of the program for a geographic area or areas under the general administration of the Commonwealth and whereby the Commonwealth may also certify fleet operators, and motor vehicle dealers, who own, lease or operate at least 15 subject vehicles, to conduct inspections of subject vehicles owned, leased or operated by them.

F. Philadelphia Area—Philadelphia, Bucks, Montgomery, Chester and Delaware Counties.

G. Pittsburgh Area—Allegheny, Beaver, Butler, Westmoreland and Washington Counties.

H. Light-duty motor vehicle—a gasoline powered 4-wheel motor vehicle rated at 7,000 pounds gross vehicle weight (GVW) or less which is commonly used on public roads or highways.

I. Medium-duty motor vehicle—a gasoline powered motor vehicle rated at more than 7,000

pounds GVW and no more than 11,000 pounds GVW which is commonly used on public roads or highways.

J. Subject Vehicle—each light-duty or medium-duty motor vehicle registered in the Philadelphia or Pittsburgh area except an antique or classic vehicle as presently defined in the Pennsylvania Vehicle Code, or any other vehicle that the Commonwealth determines is rarely used on the public roads or highways.

K. Inspector—a person authorized by the Commonwealth to perform inspections on subject vehicles.

L. Inspection facility—a place of business authorized by the Commonwealth to perform inspections on subject vehicles.

M. Exhaust emission standard—the level of exhaust emissions, prescribed by the Commonwealth, which separates subject vehicles requiring maintenance from those that do not.

N. Stringency Factor—a measure of the rigor of an inspection/maintenance program based on the estimated percentage of all subject vehicles whose exhaust emissions would exceed the exhaust emission standards for carbon monoxide and/or hydrocarbons prior to the performance of maintenance.

O. Single Sticker System—a system in which one inspection sticker is issued which does not, in any way, distinguish between compliance with the inspection/maintenance program and the inspection program presently in operation in the Commonwealth.

P. Double Sticker System—any system in which the inspection program sticker or stickers issued distinguish between compliance with the inspec-

tion/maintenance program and the inspection program presently in operation in the Commonwealth.

4. Because the Commonwealth seeks to secure the enactment by the Pennsylvania General Assembly of enabling legislation for a franchise system, PennDOT shall have until July 1, 1979 to use its best efforts to obtain such legislation. Defendant PennDOT shall further perform those other activities related to the establishment of an inspection/maintenance program which are listed in paragraphs 1 through 3 of the attached Schedule A and paragraph 1 of the attached Schedule B, which are annexed hereto and incorporated by reference into this Consent Decree, by the dates provided therein. If such legislation is not enacted by July 1, 1979, Defendant PennDOT shall immediately proceed toward implementation of a private garage system in accordance with paragraphs 2 through 8 of Schedule B pursuant to, inter alia, 75 P.S. §4701 et seq. However, on or before July 1, 1979, the parties may agree to extend this date to a date no later than October 1, 1979. If such an extension is granted and franchise legislation is not enacted within the extended time period, the dates specified in paragraphs 2 through 6 of Schedule B shall be extended by the same time period as such extension, and the dates specified in paragraphs 7 and 8 of Schedule B will be extended by three months.

5. If enabling legislation for a franchise system is enacted within the time period (or any extension thereof) specified in paragraph 4 above, Defendant PennDOT shall immediately proceed toward implementation of a franchise system in accordance with the schedule set forth in paragraphs 4 through 10 of Schedule A. If such legislation is enacted, Defendant PennDOT shall not be required to

comply with any portion of Schedule B (except as provided in paragraph 4 above).

6. The Executive Branch of the government of the Commonwealth of Pennsylvania shall not reduce below an operating level the funds for the inspection/maintenance program because of any reductions in funds appropriated to PennDOT.

7. Defendants shall establish exhaust emission standards for the inspection/maintenance program which shall result in at least a twenty-five per cent (25%) reduction in both hydrocarbon and carbon monoxide exhaust emissions by December 31, 1987, compared to the level of exhaust emissions that would exist on that date without the program; provided, that in no case will a stringency factor greater than twenty-five per cent (25%) be required if the inspection/maintenance program is implemented in accordance with the time periods specified in this Consent Decree. Should Defendants fail to establish the mandatory inspection/mandatory maintenance phase of the program on the dates specified in the applicable attached compliance schedule, Plaintiffs may seek modification of such stringency factor in order to achieve the above-referenced twenty-five per cent (25%) exhaust emissions reduction. In the event that the carbon monoxide or the photochemical oxidant primary ambient air quality standard is attained in the Philadelphia or the Pittsburgh area, the required reduction in the related exhaust emissions may be reduced in such area to a level which will at a minimum maintain such standard.

8. Defendant Commonwealth of Pennsylvania will pay, within thirty days of the entry of this Decree, reasonable counsel fees and costs to Plaintiffs' counsel in Civil

Action No. 76-2068, the Public Interest Law Center of Philadelphia, in the amount of $30,000.00, which is a full, final and complete settlement of all counsel fees, costs and any other expenses.

9. The United States and the Public Interest Law Center of Philadelphia, counsel for Plaintiffs in Civil Action No. 76-2068, will reach final agreement on the attorneys' fees question within two weeks of the entry of this decree.

10. In order to defray a portion of the start-up costs of the inspection/maintenance program, EPA hereby agrees to award a grant of $40,000.00 to PennDOT. PennDOT agrees that it shall submit no later than ninety days prior to the date upon which expenditures of funds are to be made, a full and complete grant statement (on a form to be supplied by EPA) which shall include, but not be limited to, a work plan, budget, and a statement of federal and non-federal funds to be used for the project. EPA's review of said grant statement shall be limited to insuring its completeness, insuring that moneys listed are to solely be used for inspection/maintenance start-up costs, and insuring that the payment and expenditures of funds will be made in accordance with all applicable Federal laws and regulations. The parties agree that payment shall be made in accordance with a payment schedule which shall be included in the grant award document. Nothing contained herein shall preclude the Commonwealth from requesting or being considered for additional funding for inspection/maintenance efforts; provided, however, that compliance with the terms of this Consent Decree shall not be conditioned upon the award of any such future funding.

11. For the purpose of insuring compliance with this Consent Decree, PennDOT shall submit reports to the parties listed in paragraph 14 describing all actions (including the status of franchise legislation) taken toward compliance with this Decree, beginning with a report postmarked no later than January 1, 1979 and continuing every three months thereafter until the commencement of mandatory inspection and voluntary maintenance, and a report every six months thereafter until the end of the first year of mandatory inspection and mandatory maintenance. Commencing with a report postmarked no later than ninety days following completion of the first year of mandatory inspection and mandatory maintenance and continuing every year thereafter, Defendant PennDOT shall submit reports for the previous year which include at least the following:

(a) The number of subject vehicles inspected in the inspection/maintenance program;

(b) The number of such subject vehicles whose exhaust emissions initially exceeded the exhaust emission standards for carbon monoxide and/or hydrocarbons, in total and by pollutant;

(c) The number of inspection stickers issued to subject vehicles and the number of subject vehicles registered.

12. The Commonwealth shall be allowed to institute a waiver of maintenance program, based on the establishment of maximum maintenance costs for certain subject vehicles, pursuant to regulations to be enacted by the Commonwealth. The Commonwealth shall make available to Plaintiffs evidence demonstrating the effect of such program. However, Plaintiffs will have the right to challenge any reasonable waiver provision.

13. Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

14. All reports and other information that must be submitted to Plaintiffs in satisfaction of a requirement of this Consent Decree shall be sent to:

United States Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106
Attention: Director, Enforcement Division (3EN00)

United States Environmental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460
Attention: Director, Mobile Source Enforcement Division (EN-340)

United States Department of Justice
Land and National Resources Division
Washington, D.C. 20530
Attention: Chief, Pollution Control Section

Albert Slap, Esquire
Public Interest Law Center
1315 Walnut Street, 16th Floor
Philadelphia, Pennsylvania 19107

(Signatures appear on next page)

We hereby agree to the entry of the foregoing Consent Decree.

(s) Sanford Sagalkin
Sanford Sagalkin
Acting Assistant Attorney
General, Land and Natural Resources Division

(s) Peter F. Vaira
Peter F. Vaira
United States Attorney
Philadelphia, Pennsylvania

(s) Thomas A. Pursley, III
Thomas A. Pursley, III
Attorney for United States Department of Justice

(s) Robert S. Forster, Jr.
Robert S. Forster, Jr.
Assistant United States Attorney
Philadelphia, Pennsylvania

(s) Jack J. Schramm
Jack J. Schramm
Regional Administrator
United States Environmental
Protection Agency, Region III

(s) Albert J. Slap
Albert J. Slap
Public Interest Law Center of Philadelphia
Counsel for Plaintiffs in C.A. 76-2068

(s) John Hrubovcak
John Hrubovcak, Counsel for
Pennsylvania Department of Transportation

(s) Keith Welks
Keith Welks
Counsel for Pennsylvania,
Department of Environmental Resources

(s) B. R. Jackson
Benjamin R. Jackson
Acting Deputy Assistant
Administrator for Mobile Source
and Noise Enforcement, United States
Environmental Protection Agency

So ordered this 29th day of August, 1978.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*

SCHEDULE A

To the extent Schedule A is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a franchise inspection/maintenance program:

1. *September 15, 1978.* Submit to Plaintiffs a current copy of the legislation which Defendants intend to introduce in the Pennsylvania General Assembly.

2. *October 1, 1978.*

(A) Introduce legislation in the Pennsylvania General Assembly and submit a copy of such legislation to Plaintiffs.

(B) Commence development work on a Request for Proposals to establish an inspection/maintenance program in the Philadelphia and Pittsburgh areas.

(C) Commence development of standards, procedures, and regulations for the inspection/maintenance program, including:

(1) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

(2) The requirement that, commencing twenty-one months after enactment of legislation, all subject vehicles be inspected once each year (but need not be maintained during the initial year) and in addition, commencing thirty-three months after enactment of legislation, that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 2(C)(1) of the schedule, be maintained and reinspected. If a single sticker system or a denial of registration enforcement mechanism is used by the Commonwealth, such maintenance and reinspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

(3) Enforcement procedures applicable to owners of subject vehicles effective no later than twenty-one months after enactment of legislation, including at a minimum: (a) denial of registration by the Commonwealth to any subject vehicle which does

not meet the requirements of paragraph 2(C) (2) of this schedule or an equally effective enforcement mechanism, such as the denial of a valid sticker signifying compliance with the inspection/maintenance program; (b) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 2(C) (2) of the schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(4) If the Commonwealth authorizes inspections by fleet operators and motor vehicle dealers, the following shall also be developed:

(A) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(B) The requirements for the certification of such fleet operators and motor vehicle dealers as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(C) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

3. *July 1, 1979.* Submit to Plaintiffs a draft copy of the Request for Proposals.

4. *Two months after the enactment of legislation.* Issue to potential contractors the Request for Proposals and submit this document to Plaintiffs.

5. *Five months after the enactment of legislation.* Submit to Plaintiffs a copy of the proposal selected by the Commonwealth for implementation of the inspection/maintenance program.

6. *Six montns after the enactment of legislation.*

(A) Submit to Plaintiffs a copy of the signed contract between the Commonwealth and the contractor. This contract shall, among other things, require the contractor to make the inspection records available to the Commonwealth, require the contractor to perform instrument calibration checks and allow the Commonwealth to inspect the premises of the contractor.

(B) Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs those regulations and other standards and procedures, for the inspection/maintenance program which,

at a minimum, include the provisions listed in paragraph 2(C) of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

7. *Eight months after enactment of legislation.* Adopt, and submit to Plaintiffs, final standards, procedures, and regulations for the inspection/maintenance program, which, at a minimum, include the provisions listed in paragraph 2(C) of this schedule.

8. *Fifteen months after enactment of legislation.*

(A) Commence a program to train automobile repair mechanics in the requirements of the inspection/maintenance program and the proper means of maintaining and repairing vehicles to meet such program requirements.

(B) Commence a program to inform the public and the automotive repair industry of the inspection/maintenance program.

9. *Twenty-one months after enactment of legislation.* Commence mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected at least once by the end of the 32nd month after the enactment of legislation.

10. *Thirty-three months after enactment of legislation.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program. If a single sticker system or a denial of regis-

tration enforcement mechanism is used by the Commonwealth, such maintenance and re-inspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

SCHEDULE B

To the extent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a private garage inspection/maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by January 31, 1981; and in addition, that commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1(A) of the schedule be

maintained and re-inspected prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any subject vehicle which does not meet the requirements of paragraph 1(B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1(B) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records, adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other standards and procedures, or the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

(A) Adopt, and submit to Plaintiffs, standards, procedures, and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *November 1, 1979.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted stan-

dards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

5. *February 1, 1980.* Commence a program to inform the public of the inspection/maintenance program.

6. *July 1, 1980.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by February 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

7. *August 1, 1980.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by January 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

8. *February 1, 1981.* Commence the periods of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

MODIFICATION OF CONSENT DECREE

WHEREAS, a Consent Decree was entered on August 30, 1978, as the most beneficial means to resolve this litigation; and

WHEREAS, all parties agree that modifications are necessary to the Consent Decree in order to assure timely implementation of an effective inspection/maintenance program in affected areas of the Commonwealth.

NOW THEREFORE, upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED that the August 30, 1978 Consent Decree shall be modified as follows:

"SCHEDULE B

To the extent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a private garage inspection/maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by January 31, 1981; and in addition, commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1(A) of this schedule be maintained and re-inspected prior to the expiration of the inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any

subject vehicle which does not meet the requirements of paragraph 1 (B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1 (B) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records. Periodic visits shall be unannounced and occur at least once every three (3) months for each inspection facility, unless the quality control procedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and re-

inspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other standards and procedures, for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

(A) Adopt, and submit to Plaintiffs, standards, procedures and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *February 1, 1980.* Commence study to determine the quality control procedures as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records. Such study shall consider the cost-effectiveness of the quality control procedures and include recommendations as to the frequency of periodic on-site visits and whether they should be supplemented by random on-site

visits. Such study shall also examine the quality control programs recommended or used in other states with operating or proposed private garage systems.

5. *May 1, 1980.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted standards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

6. *August 1, 1980.* Submit study of quality control procedures, including recommendations and supporting data, to Plaintiffs for review and comment. Submit the Commonwealth's proposed modifications, if any, of the procedures adopted pursuant to paragraph 1(D) of this schedule.

7. *November 1, 1980.* Commence a program to inform the public of the inspection/maintenance program. A detailed outline of this program shall be submitted to Plaintiffs by October 1, 1980.

8. *December 1, 1980.* Submit to Plaintiffs final modifications, if any, of the procedures adopted pursuant to paragraph 1(D) of this schedule. Plaintiffs reserve the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth.

9. *January 1, 1981.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mecha-

nism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by November 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

10. *May 1, 1981.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by October 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

11. *November 1, 1981.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

12. *January 1, 1982.* Submit a report evaluating the effectiveness of the quality control procedures of the I/M

program. Such report shall include a summary of the exhaust emission analyzer calibration data obtained by Defendant PennDOT from the on-site visits of official inspection stations and from the calibration reports submitted by the stations to Defendant PennDOT.

13. *January 1, 1983.* Submit a second report evaluating the effectiveness of the quality control procedures of the I/M program, as set forth in the preceding paragraph."

We hereby agree to the entry of the foregoing Modification of Consent Decree.

(s) James W. Moorman
James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

(s) Peter F. Vaira
Peter F. Vaira
United States Attorney
Philadelphia, Pennsylvania

(s) James S. Lanard
James S. Lanard
Delaware Valley Citizens'
Council for Clean Air
Counsel for Plaintiffs in C.A. 76-2068

(s) John Hrubovcak
John Hrubovcak, Counsel for
Pennsylvania Department of Transportation

(s) Kenneth Reich
Kenneth Reich
Attorney for U.S. Department of Justice

(s) Robert S. Forster, Jr.
Robert S. Forster, Jr.
Assistant United States Attorney
Philadelphia, Pennsylvania

(s) Jack J. Schramm
Jack J. Schramm
Regional Administrator
U.S. Environmental Protection
Agency, Region III

(s) Leonard Mangiaracina for
R. Sarah Compton
Director, Enforcement Division
U.S. Environmental Protection
Agency, Region III

(s) Robert B. Koegel
Robert B. Koegel
Attorney
U.S. Environmental Protection
Agency, Region III

(s) Keith Welks
Keith Welks, Counsel for
Pennsylvania Department of
Environmental Resources

(s) Benjamin R. Jackson
Benjamin R. Jackson
Deputy Assistant
Administrator for Mobile Source and
Noise Enforcement,
U.S. Environmental Protection Agency

(s) Jerome Balter
Jerome Balter
Public Interest Law
Center of Philadelphia

So Ordered this 7th day of March, 1980.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*

Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1779

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners

vs.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.
and
UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS' COUNCIL, et al.

Jerome Balter
*Michael Churchill
Public Interest Law Center of Philadelphia
1315 Walnut Street, Suite 1632
Philadelphia, Pa. 19107
(215) 735-7200

Counsel for Respondents Delaware Valley Citizens Council, et al.

*Counsel of Record.

COUNTER-STATEMENT OF PETITIONERS' QUESTION

1. Whether it is a per se abuse of judicial discretion for a federal district court to deny petitioners' Rule 60(b), F.R. Civ. P., motion to vacate a federal court consent decree entered five years earlier to settle a lawsuit enforcing a federal statute, when the moving party has obtained substantial benefits as a result of the consent decree and its motion to vacate is based on a State Supreme Court decision collaterally attacking the validity of the consent decree.

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No. 84-1779

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners

vs.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.
and
UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS' COUNCIL, et al.

Respondents, Delaware Valley Citizens' Council for Clean Air, et al, respectfully request this Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit reported at 755 F.2d 38 (3d

Cir. 1985) which is reproduced in petitioners' Appendix at 7a to 25a.

COUNTER-STATEMENT OF THE CASE

In June 1976 the plaintiffs, Delaware Valley Citizens' Council for Clean Air, et al. ("DVCCCA"), brought a citizens' lawsuit to enforce the Clean Air Act, 42 USC 7401 et seq. Named as defendants were the Commonwealth of Pennsylvania and two of its executive officers.[1] The lawsuit sought injunctive relief to compel the Commonwealth to comply with the Pennsylvania State Implementation Plan ("SIP) to establish a motor vehicle inspection and maintenance ("I/M") program in those areas of the

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[1]In addition to the Commonwealth, the other defendants were the Pennsylvania Secretary of Transportation and the Pennsylvania Secretary of the Department of Environmental Resources. The administrator of the United States Environmental Protection Agency was also named as a defendant but was subsequently dismissed when the United States brought its own action against the Commonwealth.

state which had not attained compliance with the national ambient air quality standards for carbon monoxide, 40 CFR 50.8, or ozone, 40 CFR 50.9.[2] The SIP required the Commonwealth to implement the I/M program by May 1, 1975, 40 CFR 52.2038(d)(6), 38 Fed Reg. 32884 (11/28/73).[3]

In February, 1977 the United States commenced its own action against the Commonwealth and the two actions were consolidated. The parties then undertook negotiations to settle the case by way of a consent decree.

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[2]The two geographical areas in which the I/M program was required were the 5 county greater Philadelphia air region and the 5 county greater Pittsburgh air region.

[3]The Commonwealth never challenged the I/M requirement though it had petitioned for review of other aspects of the EPA regulation. Commonwealth of Pennsylvania v. Environmental Protection Agency, 500 F.2d 246 (3rd Cir. 1974).

While these negotiations were in progress the United States Congress amended the Clean Air Act, P.L. 95-95, 91 Stat. 685 (8/7/77) in ways that were particularly relevant to the negotiations. Among the provisions added to the Clean Air Act was Section 172, 42 USC 7502, which required a state to commit itself by July 1, 1979 to implement an I/M program if it determined that it could not meet the carbon monoxide or ozone national standards by December 31, 1982. In the event that such a state failed to make the commitment it would be ineligible to receive federal-aid highway funds for those areas of the State that were in non-attainment of the air quality standards. Section 176, 42 USC 7506.

Since the Commonwealth acknowledged that it could not attain the air

quality standards by 12/31/82, 45 Fed. Reg. 33610 (5/20/80), the Commonwealth risked the imminent loss of hundreds of millions of dollars annually of federal-aid highway funds if it did not commit itself to implement the I/M program.[4]

The Clean Air Amendments, therefore, had a salutary effect on the negotiations and in August 1978 the consent decree was approved by the Court. Thereafter the Commonwealth submitted the consent decree to the EPA

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[4]An estimate of the highway funds which the Commonwealth might have lost, on an annual basis, is approximately $400,000,000. That is the amount withheld from the Commonwealth in 1982 when the district court, as a civil contempt sanction, enjoined the United States Secretary of Transportation from granting federal-aid highway funds to the Commonwealth. DVCCCA v. Commonwealth, 533 F.Supp. 869 (E.D. Pa. 1982), aff'd 678 F.2d 470 (3d Cir. 1982), cert. den., 459 U.S. 969 (1982).

as evidence of its commitment to the I/M program. 45 Fed. Reg 33611 (5/20/80).

Throughout the negotiations the defendants (the Commonwealth and the two state executive officers) were represented by the Attorney General of Pennsylvania. DVCCCA v. Commonwealth, 674 F.2d 970, 973-74 (3d Cir. 1982). The attorney general never voiced any question as to his legislative authority to enter into a decree that obligated the Commonwealth to implement an I/M program. When the parties indicated their preference for a "franchise system" I/M program the attorney general informed the negotiators that such a system had not been authorized by the legislature. Therefore the consent decree explicitly conditioned the use of a franchise system on future legislative action

(65a).[5] If, however, the legislature failed to adopt franchise system legislation the Commonwealth agreed to employ a "private garage" system (65a) for which legislative authority did exist according to the attorney general. The consent decree, therefore, did not condition the use of a private garage system on any future legislative enactment.

The filing of the consent decree, unfortunately, did not end the Commonwealth's opposition to the I/M program. The first manifestation of this opposition was the state legislature's refusal, in 1979, to pass legislation for a "franchise system" I/M program. Under the terms of the consent decree, then, the Commonwealth was required to implement a "private garage" system. (65a).

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[5]References are to the petitioners' Appendix.

In December 1979 the General Assembly voted for House Bill 739-1979 which called for a one year delay in the I/M program but the bill failed enactment when the legislature could not override the Governor's veto. A consequence of this legislative attempt to interfere with the consent decree, however, was a delay of the I/M program from August 1, 1980, as required by the consent decree (79a), to May 1, 1981 as provided in the modified consent decree. (86a).

The Commonwealth then failed to implement the I/M program by the May 1, 1981 start-up date and the Commonwealth was held to be in violation of the consent decree, DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 5/20/81); aff'd, 674 F.2d 976 (3d Cir. 1982); cert. den. 459 U.S. 905 (1982). As a consequence the district court had to

reschedule the I/M program to May 1, 1982. DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 6/16/81).

The General Assembly then enacted, over the Governor's veto, House Bill 456-1981, Act 99-1981 (10/5/81) which prohibited the Pennsylvania Department of Transportation from expending any funds to establish or implement the I/M program. The Commonwealth was then held to be in civil contempt and a contempt sanction was imposed which barred the Commonwealth from receiving federal-aid highway funds for the greater Philadelphia and Pittsburgh air regions. DVCCA v. Commonwealth, 533 F.Supp 869 (E.D. Pa. 1/22/82); aff'd. 678 F.2d 470 (3d Cir. 1982); stay den. 458 U.S. 1125 (1982); cert. den. 459 U.S. 969 (1982).

The contempt sanction remained in effect sixteen months until the General Assembly enacted Act 3-1983 (5/4/83) authorizing the Pennsylvania Secretary of Transportation to implement the I/M program.

In 1980, almost two years after the consent decree had been approved by the district court two groups of state legislators petitioned the district court for permission to intervene in the federal court action for the purpose of vacating the consent decree but both petitions were denied, DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 3/25/81); aff'd, 674 F.2d 970 (3d Cir. 1982).

While the appeal of the intervention decision was pending in the Circuit Court these legislators, in August 1981, petitioned the Commonwealth

Court of Pennsylvania to enjoin the Pennsylvania Department of Transportation from implementing the I/M program.[6] These petitions did not include the federal court plaintiffs, DVCCA and United States, as parties to the state court proceedings.

Though the General Assembly's attempt to delay the I/M program in December 1979 (House Bill 739-1979) indicated General Assembly recognition of legislative authority for the I/M program, in the Commonwealth Court the state legislators contended that there had been no legislative authority for

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[6] Burd v. Commonwealth of Pennsylvania Department of Transportation, No. 1506 C.D. 1981 (Cmwlth. Ct. of Pa.) and Scanlon v. Commonwealth of Pennsylvania Department of Transportation, No. 1762 C.D. 1981 (Cmwlth. Ct. of Pa.)

the I/M program when the Attorney General entered into the consent decree in 1978.

The Commonwealth Court in April, 1982 rejected the legislators' position and held that legislative authority had existed in 1978 to implement an I/M program. Burd v. Commonwealth, 66 Pa. Commonwealth Ct. 129, 443 A.2d 1197 (5/14/82).

One year after the Commonwealth Court's decision in Burd, supra, the General Assembly enacted Act 3-1983 (5/4/83) which authorized the Department of Transportation to go forward with the I/M program. This purged the Commonwealth's contempt and on May 6, 1983 the district court vacated the contempt sanction to enable the Commonwealth to receive the $400,000,000 of withheld federal-aid highway funds. On May 18, 1983 the district court again

modified the consent decree to establish June 1, 1984 as the new date for start up of the I/M program, a date more than nine years later than the EPA required start up date of May 1, 1975. 40 CFR 52.2038(d)(6), 38 Fed. Reg. 32884 (11/28/73).

The enactment of Act 3-1983, however, did not end the Commonwealth's resistance to the I/M program. Some five months after its passage, and after the federal-aid highway funds had been made available to the Commonwealth, and more than five years after the consent decree had been filed, the Supreme Court of Pennsylvania, in a 3 to 2 divided decision reversed the Commonwealth Court's decision in Burd and held that the Pennsylvania Attorney General had not had legislative authority in 1978 to commit the Commonwealth to implement an

I/M program and declared that the federal court consent decree was a nullity. Scanlon v. Commonwealth, 502 Pa. 577, 467 A.2d 1108 (10/26/83). (26a).

On remand, the Commonwealth Court enjoined the Pennsylvania Department of Transportation from implementing the consent decree. Burd v. Commonwealth, No. 1506 C.D. 1981 (Cmwlth. Ct. 1/9/84). (57a).

Notwithstanding the state court injunction the Pennsylvania Department of Transportation continued its I/M program preparations in conformance with its obligations under the consent decree. Some two months later, on March 5, 1984, the Commonwealth submitted its motion to the district court requesting the court, under Rule 60(b)(5), and (6), Fed. Rules of Civil Proc., to vacate the consent decree

in the light of the state court decisions. The district court, however, denied the motion. DVCCA v. Commonwealth, C. A. 76-2068 (E.D. Pa. 4/13/84) (1a); aff'd, 755 F.2d 38 (3d Cir. 2/11/85). (7a).

The Commonwealth did, finally, implement the I/M program on June 1, 1984, as required by the district court order of 5/18/83, and the program has been operating continuously to the present time.

REASONS FOR DENYING THE WRIT

SUMMARY

Petitioners seek review of the circuit court decision affirming the district court's denial of petitioners' motion to vacate the federal district court consent decree designed to enforce federal environmental legislation. Petitioners filed their motion to vacate more than five years after the consent decree was entered and more than two years after petitioners were held to be in civil contempt.

Motions to vacate final judgments, under Rule 60(b), F.R. Civ. P., are directed to the discretion of the district court. Appellate review of Rule 60(b) decisions are based on an abuse of discretion standard.

The circuit court review found there was a "profound lack of equities in the [petitioners'] position" (23a) and held that the district court had not abused its discretion. This strong, unanimous appellate affirmation of the district court's decision does not warrant yet another review for abuse of discretion.

Petitioners contend that a federal court, as a matter of law, must vacate a federal court consent decree if subsequent to the consent decree a State Supreme Court determines that as a matter of state law, that the federal decree is a nullity. This claim has no support in case law, is contrary to the decisions of this Court and violates the equitable principles for deciding motions to modify or vacate final federal court judgments.

I. THE DISTRICT COURT DID NOT ABUSE ITS JUDICIAL DISCRETION IN DENYING PETITIONERS RULE 60(b) MOTION TO VACATE THE CONSENT DECREE

-A-

The Commonwealth's motion to vacate the consent decree was filed more than five (5) years after the decree was approved by the district court. It was brought pursuant to Rule 60(b), F.R. Civ. P., which provides for equitable relief from final judgments to strike a proper balance between the conflicting principles that litigation be brought to an end and that justice be done. Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir 1978). Rule 60(b) motions, therefore, must be decided on equitable grounds at the sound discretion of the

court. Virgin Islands National Bank v. Tyson, 506 F.2d 802, 804 (3d Cir 1974); Greco v. Reynolds, 416 F.2d 963 (3d Cir. 1969).

The scope of appellate review of Rule 60(b) decisions is limited to a determination of whether the district court decision was an abuse of judicial discretion. United States Steel Corp. v. Fraternal Association of Steelhaulers, 601 F.2d 1269, 1274 (3d Cir. 1979), Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir. 1978).

Relief from final judgments is extraordinary and may be granted only upon a showing of exceptional circumstances and even then the party seeking relief must bear a heavy burden to establish that "dangers once substantial, have become attenuated to a shadow."

United States v. Swift & Co., 286 U.S. 106, 119 (1932); and the principle of finality of judgment demands that the party seeking relief demonstrate that absent relief from judgment it will suffer extreme and unexpected hardship. Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977).

Petitioners' motion to vacate was brought under Rule 60(b)(5) and Rule 60(b)(6). Under Rule 60(b)(5) the moving party must demonstrate that it is entitled to relief from the terms of the final judgment (or consent decree) because "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(6) requires the moving party to demonstrate that there is "any other reason justifying relief from

the operation of the judgment." Petitioners have not met the test in respect to either of these rules.

-B-

This citizens' lawsuit to enforce the Clean Air Act, 42 USC 7401 et seq., was commenced in 1976 because the Commonwealth had failed to meet its obligation under the Pennsylvania State Implementation Plan, 40 CFR 52.2020 et seq., to implement a motor vehicle emission inspection and maintenance ("I/M") program by May 1, 1975. 40 CFR 52.2038 (d)(6). The I/M program is one of the United States Environmental Protection Agency ("EPA") requirements designed to attain compliance with the national ambient air quality standards for carbon monoxide, 40 CFR 50.8, and ozone, 40 CFR 50.9.

Now, ten years after the I/M program was scheduled to start, the Commonwealth has still not attained the national air standards for those two air pollutants. Therefore, it cannot be said that the danger which the consent decree was designed to help overcome has been "attenuated to a shadow."

The petitioners acknowledge that the continuation of the I/M program required by the consent decree will not cause them to suffer "extreme and unexpected hardship" because they declare they will continue the I/M program even if the consent decree, is vacated. (23a).

Petitioners fail to meet the danger attentuation test of Swift & Co., supra, and they fail to meet the hardship test of Mayberry, supra. Failure to meet either of these tests would warrant that

petitioners' motion be denied, failure to meet both tests requires that the motion to be denied. The nine year history of this litigation demonstrates that "every branch of the government of the Commonwealth of Pennsylvania - the executive, legislative, and judicial - has fought tooth and nail every effort of plaintiff to make Pennsylvania respect the provisions of a federal statute." DVCCCA v. Commonwealth, Nos. 84-1179 & 84-1208 (3d Cir. 5/14/85); Slip op. p. 18. (Becker, Circuit Judge).

The counter-statement of the case, supra, sets forth the long list of executive, legislative and judicial actions by the Commonwealth to avoid compliance with federal law and federal court orders. These include, inter alia, the violation of the consent decree, DVCCCA v. Commonwealth, C.A. No. 76-2068

(E.D. Pa. 5/20/81); affd. 674 F.2d 976 (3d Cir. 1982); cert. den. 459 U.S. 905 (1982), which caused the I/M program to be delayed twelve (12) months; legislative enactment of House Bill 456, Act 99-1981 (10/5/81) which cut off funds for implementing the I/M program and caused the district court to hold the Commonwealth in civil contempt, DVCCCA v. Commonwealth, 533 F.Supp 869 (E.D. Pa. 1982); aff'd. 678 F.2d 470 (3d Cir. 1982); stay den. 458 U.S. 1125 (1982) (Rehnquist, J.); cert den. 459 U.S. 969 (1982), and caused the I/M program to be delayed an additional twenty five (25) months.

Throughout this period of intense legislative and executive department resistance the Commonwealth was receiving approximately $400,000,000 per year of federal-aid highway funds for

the greater Philadelphia and Pittsburgh air regions.[7] The Commonwealth would have been ineligible for these federal funds unless it had made a firm and binding commitment to implement the I/M program. Section 176, 42 USC 7506. See also 45 Fed. Reg. 33607 et seq. (5/20/80).[8] The Commonwealth, however,

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[7]These funds were temporarily withheld by the civil contempt sanction imposed in January, 1982, DVCCCA v. Commonwealth, 533 F.Supp 869 (E.D. Pa. 1982), until May, 1983 when the state legislature enacted Act 3 - 1983 (5/4/83) and purged the Commonwealth's contempt.

[8]In 1980, when the state of California failed to commit itself to implement an I/M program in the air regions which had not attained national ambient air quality standards for ozone or carbon monoxide federal-aid highway funds were withheld in accordance with the requirements of Section 176. 45 Fed. Reg. 81746 (12/12/80).

has stated it is not prepared to return these federal-aid funds to the federal government if the federal courts were to grant their motion to vacate the consent decree. (22a). Thus, the Commonwealth would have the federal court nullify the consent decree on the basis of the decision of the Pennsylvania Supreme Court, Scanlon v. Commonwealth, 502 Pa. 577, 467 A.2d 1108 (1983), but would retain the fruits of the consent decree as though the decree had not been nullified.

Petitioners contend, despite their years long contumacious opposition to the I/M program, that it was an abuse of judicial discretion for the district court to refuse to "put plaintiffs in a position whereby enforcement of the rights plaintiffs have acquired through-

out this extensive litigation would be in [petitioner's] hands." DVCCCA v. Commonwealth, C.A. No. 76-2068 (E.D. Pa. 4/13/84). (2a). In unanimously affirming, the Circuit Court concluded "[W]e find a profound lack of equities in the Commonwealth's position before the district court." DVCCCA v. Commonwealth, 775 F.2d 38 (3d Cir. 4/26/84) (Aldersert, Chief Judge).

In sum, petitioners have failed to meet those tests established by federal courts to warrant a modification or vacation of final judgments. A review of the equities so clearly establishes that they are against the petitioners that further appellate review is unwarranted.

II. THE THIRD CIRCUIT DECISION IS NOT IN CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS

Though petitioners submitted their motion to vacate under Rule 60(b) and the district court properly used equitable principles to decide the motion and the Court of Appeals for the Third Circuit found that the district court had not abused its discretion petitioners, nonetheless, contend that the Third Circuit decision is in conflict with decisions of two other Circuit Courts. Petitioners contention is manifestly unsound since each Rule 60(b) motion is unique and must be decided on equitable principles on its own set of facts and its own merits. Cf., Mayberry v. Maroney. 558 F.2d 1159, 1164 (3d Cir. 1977).

Hoping to avoid the equitable principles which guide Rule 60(b) determinations, petitioners' brief fails to note that their motion to vacate was brought pursuant to Rule 60(b) and that the district court's denial of the motion was correctly reviewed by the Third Circuit under an abuse of discretion standard.

Petitioners suggest that the district court should have vacated the consent decree as a matter of law (Pet. Statement of Question), (Pet. Br. p. 14) because of the Pennsylvania Supreme Court's collateral attack on the federal court consent decree. This is a question which petitioners had not submitted to the district court.

Petitioners have not cited any case which holds that a final federal

court judgment must be vacated as a matter of law. Such a rule does not exist because it could result in severe inequities. Such a rule, applied here, would result in the unjust enrichment of the petitioners who gained hundreds of millions of federal funds by entering into the consent decree and now wish to escape the obligations of that very same decree. That is why all motions for relief from final judgments under Rule 60(b) are decided on equitable rather than legal grounds and why state court decisions subsequent to a final federal court judment, cannot have the effect of nullifying the federal court judgment.

Petitioners cite Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983), and West v. Bank of Commerce & Trusts, 167 F.2d 664 (4th Cir. 1948), as cases that are in conflict with the Third

Circuit decision here. Petitioners are mistaken. The cases cited do not involve state court decisions to nullify federal judgments subsequent to a federal court judgment and the vacation of the consent decrees in those cases were made under traditional equitable standards based on the particular facts of the individual cases.

Hence the Third Circuit decision does not conflict with decisions in the other circuits.

III. STATE COURTS MAY NOT ENJOIN FEDERAL COURT JUDGMENTS ENFORCING FEDERAL STATUTES

In Scanlon v. Commonwealth Department of Transportation, 502 Pa. 577, 467 A.2d 1108 (1983), two groups of state legislators sought to enjoin the executive branch of the Commonwealth from

implementing the I/M program mandated by the federal court consent decree. Neither DVCCCA nor the United States, plaintiffs in the federal action, were parties to the state court proceeding.

In the state court proceeding, involving only the three branches of the Commonwealth government, the Pennsylvania Supreme Court held that legislative authority for an I/M program had not existed when the consent decree was entered and the court declared the federal decree to be a nullity and unenforceable. (42a) Thereafter the Commonwealth Court enjoined the Pennsylvania Department of Transportation "from carrying out the terms and conditions of the Consent Decree." Burd v. Commonwealth Department of Transportation, No. 1506 C.D. 1981 (Cmwlth Ct. 1/9/84). (58a).

Though the state court injunction has been in force since January 1984 petitioners have never conformed to its terms. Instead, petitioners chose to abide by the requirements of the federal court consent decree; they implemented the I/M program on June 1, 1984 and have continued to operate the program ever since. Nevertheless, petitioners maintain that the federal courts must give full faith and credit to the decision of the Pennsylvania Supreme Court and must vacate the federal decree. Petitioners' contention is without support in law.

Since McKim v. Voorhies, 11 U.S. (7 Cranch) 279 (1812), when this Court declared "[t]he State Court has no jurisdiction to enjoin a judgment of the Circuit Court of the United States..." Id. at 281, the federal courts have

consistently upheld the rule of comity which requires state courts to recognize and honor federal court judgments. In Embry v. Palmer, 107 U.S. 3 (1882) this Court declared:

> "[T]he judgments of the courts of the United States have invariably been recognized, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced... The rule for determining what effect shall be given to such judgments is that declared by this court, in respect to the faith and credit to be given to the judgments of State courts in the courts of other States."

107 U.S. at 10.

Central National Bank v. Stevens, 169 U.S. 432 (1898) held that "the exemption of the authority of the Courts of the United States from interference by legislative or judicial action of the

States is essential to their independence and efficiency." Id. at 460-61. And in Stoll v. Gottlieb, 305 U.S. 165 (1938) this Court ruled that:

> "[T]he judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where judgment or decree of the federal court determines a right under a federal statute, that decision is final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" [Citations omitted].
> (emphasis added).

305 U.S. at 170.

Whether grounded on the doctrine of res judicata, full faith and credit or the Supremacy Clause of the United States Constitution, Article VI, the federal courts have consistently defended

federal court judgments from direct and collateral attack by state courts. "It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts given the basic requirement that state courts honor the courts in other states and that federal courts must honor state court judgments." 18 C. Wright, A. Miller & E. Cooper § 4468 (1981), Federal Practice and Procedure. See also, Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976).

Petitioners do not question the federal subject matter jurisdiction of this action, nor do they question the authority of the Pennsylvania Attorney General to represent the Commonwealth and the other defendants in the action. What petitioners do question is the scope of the Attorney General's authority when

he negotiated the consent decree. But that question is clearly ancillary to the enforcement of the federal statute; it could have been raised before the final federal court judgment was entered. Now, more than five years after that judgment was entered, the doctrine of res judicata bars relitigation by the parties or their privies of issues that were or could have been raised in the original action. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 162 S. Ct. 1883, 1889 n.6 (1982); Federated Department Stores v. Moitie, 452 U.S. 394, 398 (1981).

The res judicata doctrine has also been recognized by the courts of Pennsylvania to bar relitigation of matters ancillary to federal court judgments where there was federal law subject matter jurisdiction. Thus in London v. Philadelphia, 412 Pa. 496, 194

A.2d 901 (1963) the Pennsylvania Supreme Court declared:

> "Once the federal court validly acquired jurisdiction, its jurisdiction extended to all matters ancillary to the main cause of action even though the ancillary matter lacked federal jurisdictional requisites..."
> (emphasis added)

412 Pa. at 499, 194 A.2d at 902-03. Similarly in Bardo v. Commonwealth, 40 Pa. Commonwealth 558, 397 A.2d 1305 (1979) the state appellate court noted:

> "It is clear that a federal court decision is res judicata in subsequent state proceedings..."

Id. at 587 n. 1, 397 A.2d at 1307 n. 1, See also Williams v. Wilkes, 14 Pa. 228, 231 (1850).

The federal and Pennsylvania state courts have long recognized that

the doctrine of res judicata bars the state courts from interfering with federal judgments implicating federal law. The decision in Scanlon is an aberration in that judicial history. Therefore review of the Circuit Court's judgment is not warranted.

CONCLUSION

For the foregoing reasons Respondents, Delaware Valley Citizens Council for Clean Air, respectfully request this Court deny the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

The Public Interest Law Center
of Philadelphia

Jerome Balter
*Michael Churchill

1315 Walnut Street, Suite 1632
Philadelphia, Pa. 19107
(215) 735-7200

Counsel for Respondents,
Delaware Valley Citizens
for Clean Air et al.

*Counsel of Record

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No. 84-1779

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PETER R. STEENLAND, JR.
JACQUES B. GELIN
MARIA A. IIZUKA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the Commonwealth of Pennsylvania was precluded by the doctrine of res judicata from relying on a state court judgment "invalidating" a federal court consent decree entered into by the State to challenge the earlier federal court judgment ratifying the consent decree.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1779

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-25a) is reported at 755 F.2d 38. The orders of the district court (Pet. App. 1a-2a, 3a-6a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1985. The petition for a writ of certiorari was filed on May 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Amendments of 1970, 42 U.S.C. (1976 ed.) 1857 *et seq.*, required each state to submit to the Environmental Protection Agency a state implementation plan

for reducing air pollution to meet certain national standards. 42 U.S.C. (1976 ed.) 1857c-5.[1] Petitioner Commonwealth of Pennsylvania submitted a plan that included, among other things, an inspection and maintenance (I/M) program for automobile emission systems. EPA modified and promulgated the plan; it specified that the I/M program was to be implemented by May 1, 1975. The I/M program required motor vehicles to be inspected annually to determine if their exhaust emitted excessive amounts of pollutants. If they did, the owners would be required to have the necessary repairs made. The Commonwealth sought review of certain aspects of the plan as promulgated, but it did not challenge either the requirement that it implement an I/M program or the deadline for implementing that program. See *Pennsylvania* v. *EPA*, 500 F.2d 246 (3d Cir. 1974).

The Commonwealth never implemented the I/M program. In 1976, respondent Delaware Valley Citizens' Council for Clean Air (Delaware Valley) sued petitioners—the Commonwealth and certain state agencies and officials—in the United States District Court for the Eastern District of Pennsylvania, seeking to require them to implement the I/M program. In 1977, the United States also sued petitioners, seeking similar relief. Pet. App. 11a. On August 29, 1978, petitioners entered into a consent decree with Delaware Valley and the United States, agreeing to implement an I/M program for certain areas by August 1, 1980. The consent decree was embodied in an order of the district court (*id.* at 60a-80a).

In March 1980, the parties and the district court agreed to extend the deadline for implementing the program to May 1, 1981 (Pet. App. 86a). The Commonwealth failed to meet

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[1]The Clean Air Act was amended and recodified in 1977. See Clean Air Act Amendments of 1977, 42 U.S.C. 7401 *et seq.* The provision governing state implementation plans now appears at 42 U.S.C. 7410.

that deadline. In February 1981, petitioners still had not issued regulations specifying the equipment needed in the I/M program, and they sought a further extension of the deadline to January 1, 1983. In June 1981, the district court, after learning from EPA that air quality in the areas covered by the decree still did not meet the specified national standard, refused to extend the deadline further. The court declared petitioners to be in violation of the consent decree and ordered them to submit a plan for the immediate implementation of the I/M program. The court modified that plan and ordered that it be implemented by May 1, 1982. On petitioners' appeal, the court of appeals unanimously affirmed. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 674 F.2d 976 (3d Cir.), cert. denied, 459 U.S. 905 (1982).

2. Following the district court's decision of June 1981, the Pennsylvania legislature enacted a statute, H.B. 456, over the governor's veto, prohibiting the expenditure of any funds on the I/M program. Delaware Valley then moved to have petitioners declared in contempt.

In a lengthy opinion, the district court declined to consider H.B. 456 to be a changed circumstance that warranted modification of its order. The court noted that "the Commonwealth of Pennsylvania with a full range of technical and professional guidance and representation at its disposal entered, after considerable opportunity for deliberation and negotiation, into a consent decree in which it agreed to implement an I/M program * * *." *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 533 F. Supp. 869, 880 (E.D. Pa.), aff'd, 678 F.2d 470 (3d Cir.), cert. denied, 459 U.S. 969 (1982). The court further stated (533 F. Supp. at 880): "In this case, there is no doubt that [petitioners] are no longer complying with the consent decree. [Petitioners] themselves admitted, that with the passage of H.B. 456, they had discontinued all efforts to implement an I/M

program * * *." The district court accordingly declared the Commonwealth to be in civil contempt and imposed sanctions. The court enjoined the Secretary of the United States Department of Transportation from approving any projects or awarding any grants for highways in the areas covered by the consent decree other than for the purposes of safety, mass transit, or projects related to the improvement of air quality. 533 F. Supp. at 883-884. On petitioners' appeal, the court of appeals again unanimously affirmed, and this Court again denied certiorari. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 678 F.2d 470 (3d Cir.), cert. denied, 459 U.S. 969 (1982).

3. Shortly after the enactment of H.B. 456, two groups of state legislators filed actions in the Commonwealth Court of Pennsylvania, challenging the validity of the consent decree. *Burd* v. *Commonwealth*, 443 A.2d 1197 (1982), rev'd *sub nom. Scanlon* v. *Commonwealth*, 502 Pa. 577, 467 A.2d 1108 (1983).[2] Characterizing the action brought by the state legislators as "a classic confrontation between the federal and state judicial systems" (443 A.2d at 1198), the state court recognized both the validity of the federal decree and the Commonwealth's statutory authority, H.B. 456 notwithstanding, to implement the decree. Nevertheless, the court also acknowledged that, because of H.B. 456, the Commonwealth lacked the financial means to exercise its statutory authority. The court declined to grant the legislators' motion to enjoin petitioners from implementing the I/M program.

On appeal, the Supreme Court of Pennsylvania reversed and remanded. *Scanlon* v. *Commonwealth*, 502 Pa. 577, 467 A.2d 1108 (1983) (Pet. App. 26a-55a). Holding that the

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[2]These same legislators had sought unsuccessfully to intervene in the federal proceedings. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 674 F.2d 970 (3d Cir.), cert. denied, 458 U.S. 1125 (1982).

Commonwealth was not bound by the federal decree because, first, the decree "was signed only by the Pennsylvania Department of Transportation and the Pennsylvania Department of Environmental Resources" (*id.* at 29a n.5), and, second, because relevant state motor vehicle statutes provided no authority for the Pennsylvania Department of Transportation to enter into the consent decree,[3] the state supreme court declared the federal decree "a nullity" (*id.* at 42a). Two justices of the state supreme court dissented (*id.* at 43a-55a).

On remand, the Commonwealth Court ordered the Commonwealth to cease all activities required to comply with the federal consent decree (Pet. App. 57a-59a).

4. The Commonwealth then moved in federal court to vacate the consent decree. The motion was denied by the district court (Pet. App. 1a-2a), and the court of appeals unanimously affirmed (*id.* at 7a-25a). Rejecting the notion that the dispute turned on state law, the court of appeals first stated that "what was attacked collaterally in the state court system was a final federal court judgment" (*id.* at 15a). The court of appeals then noted that the state supreme court's conclusion that the Commonwealth could not be bound by the signatures of counsel for the Pennsylvania Departments of Transportation and Environmental Resources contradicted an earlier holding of the Third Circuit that the consent decree bound the entire Commonwealth and its officers, agents, and employees (*id.* at

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[3]The court concluded that legislation enacted by the Commonwealth's legislature in 1983, Act of May 4, 1983, Act No. 3, 75 Pa. Cons. Stat. Ann. § 4706(b) (Purdon Supp. 1985), which permits the establishment of an I/M system only when required to comply with federal law and to avoid the cut-off of federal funds—the situation in this case—did not serve to validate the consent decree retroactively. The court described the 1983 enactment as being "coerced by a Federal Court Order, and delivered as ransom for the rescue of the citizens of Pennsylvania from the considerable financial distress caused by the withholding of million[s] of dollars in taxpayers' funds ticketed for Pennsylvania highways" (Pet. App. 40a-41a (footnote omitted)).

15a-16a). Thus, the court of appeals concluded that "the ostensible relief" provided by the state court ruling "flies in the face of settled law and the doctrine of *res judicata*" (*id.* at 17a). The court summarized its holding as follows (*id.* at 21a (footnote omitted)):

> Therefore, the case devolves to this. Only the federal courts have the power to determine the authority of federal court litigants, bringing suit under federal law, to enter into consent decrees approved by a federal court. The resolution of this dispute does not go to the substantive merits of the controversy, but it goes directly to basic jurisdictional powers of courts of separate sovereignties. Accordingly, although the Pennsylvania Supreme Court's discussion of state statutes and especially its motor vehicle code is impressive and erudite, jurisprudentially speaking, it is irrelevant to the overarching question of the competency of a state court to interfere with a final, federal court judgment bottomed on federal law.

ARGUMENT

The court of appeals correctly concluded that the state court lacked the power to entertain a challenge to a final federal court decree entered pursuant to federal law. The decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly disposed of the issues raised by petitioners when it recognized that "the Commonwealth could have litigated in 1978 in the federal court issues presented before the state court in *Scanlon*" (Pet. App. 20a-21a). Petitioners' failure to do so precludes them, under the doctrine of res judicata, from pursuing this belated attempt to challenge a valid federal court decree. In *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 467

n.6 (1982), this Court noted the importance of the doctrine of res judicata "in fulfilling the purpose for which civil courts ha[ve] been established, the conclusive resolution of disputes within their jurisdiction."

Petitioners do not challenge the court of appeals' conclusion that they could have raised the issues they now seek to litigate in the 1978 federal court proceedings, nor do they offer any excuse for their failure to do so. Instead, petitioners' sole response to this insurmountable barrier is that "[r]es judicata must be raised in the District Court and may not be raised by the parties on appeal" (Pet. 16). This argument does not withstand scrutiny. It does not matter whether res judicata is raised by a party in district court, or in the court of appeals, or not at all, because of the clear authority of a court, sua sponte, to raise the issue. As the court stated in *American Furniture Co.* v. *International Accommodations Supply*, 721 F.2d 478, 482 (5th Cir. 1981):

> In the posture of this case * * *, where all of the relevant facts are contained in the record before us and all are uncontroverted, we may not ignore their legal effect, nor may we decline to consider the application of controlling rules of law to dispositive facts, simply because neither party has seen fit to invite our attention to the issue by technically correct and exact pleadings. We do so *sua sponte*.

See also *W.E. Hedger Transp. Corp.* v. *Ira S. Bushey & Sons, Inc.*, 186 F.2d 236, 237 (2d Cir. 1951). In this case, petitioners "can claim no surprise or prejudice" (*American Furniture Co.*, 721 F.2d at 482) from the fact that the court of appeals treated the preexisting federal decree as res judicata. All parties and the state court were well aware of the

existence of a final judgment.[4] Petitioners, therefore, cannot be heard to complain of injustice simply because the court of appeals articulated the obvious. See *Los Angeles Branch NAACP* v. *Los Angeles Unified School Dist.*, 750 F.2d 731, 745 (9th Cir. 1984) (en banc):

> There is no manifest injustive in denying plaintiffs the opportunity to relitigate a part of a claim when they had a previous opportunity to do so but elected against it.

For this reason alone, the judgment of the court of appeals was correct and should be left undisturbed.

2. The bar of res judicata is not the only obstacle to petitioners' reliance on state law to escape their federal obligations. First, the state supreme court disregarded decisions of this Court as well as its own courts holding that, under the Full Faith and Credit Clause of the Constitution (Art. IV, § 1), state courts are not free to disregard the judgments of federal courts. See, *e.g.*, *Stoll* v. *Gottlieb*, 305 U.S. 165, 170 (1938); *Embry* v. *Palmer*, 107 U.S. 3, 10 (1883); *Bardo* v. *Commonwealth*, 40 Pa. Commw. 585, 587 n.1, 397 A.2d 1305, 1307 n.1 (1979). As this Court stated in *Donovan* v. *City of Dallas*, 377 U.S. 408, 412 (1964) (footnote omitted):

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[4]In *Scanlon*, the Supreme Court of Pennsylvania described the federal actions as follows: "[W]ithout adjudication of any of the issues raised, the actions were concluded by the entry of a consent decree agreed to by counsel for the parties to the lawsuits" (Pet. App. 29a (footnote omitted)). If the state court meant to suggest that such a decree is something less than a judgment of a court issued after the parties have fully litigated their differences, it was in error. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110 (1983); *A. D. Juilliard & Co.* v. *Johnson*, 166 F. Supp. 577, 585 (S.D.N.Y. 1957), aff'd, 259 F.2d 837 (2d Cir. 1958), cert. denied, 359 U.S. 942 (1959). "[A] consent judgment 'is as conclusive and final as to any matter determined as one rendered in invitum after contest and trial. And such a judgment cannot be impeached collaterally in another proceeding.' " *Nash County Bd. of Educ.* v. *Biltmore Co.*, 640 F.2d 484, 487 (4th Cir. 1981) (citation omitted).

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings.

It was wholly inappropriate for the state court to interject itself into these federal proceedings and to declare the federal decree "a nullity." Moreover, as the court of appeals noted (Pet. App. 23a n.6), there need be no concern over the prospect of future interference by the state courts. The Anti-Injunction Act, 28 U.S.C. 2283, ensures that petitioners need not be put in the awkward situation of attempting to comply with conflicting court orders.[5]

Second, the federal interest in the subject matter of this litigation is clearly paramount to the concerns of the state supreme court. Because of the clear, congressionally-established mandate to achieve compliance with the ambient air quality standards required under the Clean Air Act, there was no reason in this case for the federal courts to defer to the state supreme court on any inconsistent interpretation of the long-standing consent decree duly entered in federal court. The decision of the state court, issued so late in this protracted dispute, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted). Moreover, Congress clearly contemplated the cooperation of the states with the federal

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[5]The action of the state supreme court in this matter is quite similar to the situation before this Court in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). There, the Washington Supreme Court had held that state agencies could not comply with a duly entered federal court injunction. This Court disagreed, holding that "[s]tate-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution" (443 U.S. at 695). That holding is equally applicable here.

government in implementing the Clean Air Act. See 42 U.S.C. 7401(a)(3) and (4). The decision of the state supreme court fails to take into account the overriding federal interest in ensuring compliance with the requirements of the Clean Air Act as expressed through the Commonwealth's state implementation plan and a valid consent decree signed by the Commonwealth's representatives. As this Court held in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942) (citations omitted):

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. * * * [T]he doctrine of [*Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)], is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal regulations which they affect must be deemed governed by federal law having its source in those statutes rather than by local law. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.

3. Petitioners argue (Pet. 14-15) that the decision of the court of appeals conflicts with the decisions of two other federal courts that have held that federal consent decrees must be vacated when in conflict with state law. But the two cases relied on by petitioners, *Washington* v. *Penwell*, 700 F.2d 570 (9th Cir. 1983), and *West* v. *Bank of Commerce & Trusts*, 167 F.2d 664 (4th Cir. 1948), simply restate the rule that "an attorney at law has no authority, without his client's permission, to compromise his client's claim" (*West*,

167 F.2d at 666). In *Penwell*, the court of appeals noted that "[t]he named defendants in this lawsuit were the state officials, not the state" (700 F.2d at 573 n.3). Thus, the decree in *Penwell* had the effect of binding a non-party, thereby creating "an impermissible constitutional confrontation between the federal court and the state legislature" (700 F.2d at 574). No similar concern is present in the instant case.

Much earlier in this litigation, the court of appeals conclusively held that the Commonwealth was a party to the litigation, that it had been properly represented by the Pennsylvania Department of Justice throughout the litigation, and that it was bound by the federal consent decree. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 678 F.2d 470, 475-476 (3d Cir.), cert. denied, 459 U.S. 969 (1982). Clearly, a federal court can make its own determination as to those parties properly before it. The state supreme court, in rejecting the prior holding of the Third Circuit, was simply wrong on the facts as well as the law. Contrary to the state court's assertion (Pet. App. 29a-30a n.5), the Commonwealth was and always has been a named defendant in this litigation, with authority to bind the entire Commonwealth. Thus, "even if the executive branch defendants were physically or legally incapable of complying with the decree, those Commonwealth officials sitting in the General Assembly certainly are not incapable of insuring the Commonwealth's compliance" (678 F.2d at 475-476 (footnote omitted)). Similarly, as noted in the dissenting opinion of Justice Zappala, "regardless of the intragovernmental processes necessary to comply, the Commonwealth itself, not just the agencies of the executive, but the entire state government, became bound by the consent decree" (Pet. App. 48a). There is therefore no warrant to disturb the lower courts' refusal to vacate the consent decree.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PETER R. STEENLAND, JR.
JACQUES B. GELIN
MARIA A. IIZUKA
Attorneys

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